Supreme Court, U.S.
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In the Supreme Court of the United States

BAYER CORPORATION AND WYETH,
Petitioners,

v.

JAMES E. ANDERSON, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether plaintiffs asserting claims only against diverse defendants can defeat a defendant's right to remove, based on diversity jurisdiction, by improperly joining (a) plaintiffs asserting claims against non-diverse defendants, and (b) non-diverse defendants against whom they assert no claims?

PARTIES TO THE PROCEEDING

The parties to the proceeding in this Court are as follows:

Bayer Corporation and Wyeth, *Petitioners*

James E. Anderson, James Anderson, Jr., John R. Anderson, Jack Archer, Dorothy Bailey Banks, Louis Bailey and Barbara Bailey, Sheila Barkley, Kathy Bradham, Eddie Butler, Ethel Carter, Ernestine Dale and M.J. Dale, Elizabeth Elmore, Daisy Harris, Leeida Henard, Robert Hendry, Dollas Jacob and Eugene Jacob, Ollie L. King, William C. Magee and Rosie Magee, Belain Merrick, Glenn Maier and Paula Maier, Sharon Twyner McKinney, Valerie Mitchell, Melanie Netterville and Charles Netterville, Veronica Nickelson, Elizabeth Pritchard, Edward Schuette, Levi Smith, Sr. and Marjorie Smith, Willie Thompson and Mae Thompson, Alfanette Vaughn, Della Warren, Lois Washington, Shawanda Washington, Charles Welch, Patricia Wells, Martha Wicks, Nathaniel Williams and Bobbie Williams, Roger Dale Wilson and Wilma Diane Wilson, Delores Woods, Robert Green, Lillian Pace, Joy Pickering and Judd Pickering, James Lang and Mildred Marshall, *Respondents*

The parties to the proceeding in the court whose judgment is sought to be reviewed are as follows:

Bayer Corporation, Wyeth, GlaxoSmithKline Consumer Healthcare, L.P., SmithKline Beecham Corporation d/b/a GlaxosmithKline, Block Drug Co., Inc., Block Drug Corporation, Bristol Myers Squibb, Procter & Gamble Pharmaceuticals, Inc., Novartis Consumer Health, Inc. and

Novartis Pharmaceuticals Corporation[1], McNeil-PPC, Inc., Wal-Mart Stores, Amerisource Bergan, Rite-Aid, Walco Oil, Super D Drugs Acquisition, Wal-Mart Stores East, Liberty Drug Store, and K & B Services, Inc., *Appellees*

All Respondents here are Appellants below.

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[1] In the Appellees' Brief in the court below Novartis Consumer Health, Inc. and Novartis Pharmaceuticals Corporation stated: "Neither Novartis Consumer Health, Inc. ("NCH") nor Novartis Pharmaceuticals Corporation ("NPC") were named as defendants in the original multiple-plaintiff *Anderson et al. v. Bayer Corp et al.* action. LilAnn Pace, one of the plaintiffs in that action, attempted to add NCH as a new defendant in her individual action, which was not authorized by CMO 15, other order of the District court or stipulation by the parties to that case. Further, neither NCH nor NPC were ever served with Ms. Pace's unauthorized individual complaint. Although NCH and NPC may be listed on certificates of service in this appeal and/or noted as appellees on this appeal's docket sheet, neither NCH nor NPC have been named in the caption of the Anderson appeal (04-35875). Therefore, NCH's and NPC's joinder in this brief should not be construed as an appearance or waiver of its rights, objections, or defenses, including, and without limitation, insufficiency of process, insufficiency of service of process and personal jurisdiction."

STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Petitioner Bayer Corporation:

Petitioner Bayer Corporation is a wholly owned subsidiary of Bayer AG, a publicly held German company.

Petitioner Wyeth f/k/a American Home Products:

Petitioner Wyeth is a publicly traded company. Wyeth does not have any parent corporations and no publicly held company owns ten percent (10%) or more of its outstanding shares.

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Petitioners Bayer Corporation and Wyeth respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The Memorandum of the United States Court of Appeals for the Ninth Circuit dated March 13, 2006, reversing the decision of the district court, appears at Pet. App. A at 1a and is unpublished.

The Opinion of the United States District Court for the Western District of Washington, dismissing the action, appears at Pet. App. B at 19a and is unpublished. The Opinion of the United States District Court for the Western District of Washington, denying Plaintiffs' Motion to Remand, appears at Pet. App. C at 26a and is unpublished.

JURISDICTION

The order of the United States court of appeals sought to be reviewed was entered on March 13, 2006. A timely petition for panel rehearing and for rehearing en banc was denied on April 20, 2006 (Pet. App. D at 32a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are 28 U.S.C. §§ 1332 (a) (1), (c) (1), 1441 (a), (b), 1446 (a), (b), (d), and 1447 (c), (d), which appear at Pet. App. E at 34a.

Section 1332 (a) (1) provides in relevant part: "The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between—(1) citizens of different states . . . ."

Section 1441 (a) provides in relevant part: "Except as otherwise provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending." Section 1441 (b) provides in relevant part: "Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought."

STATEMENT OF THE CASE

This case presents an important question regarding plaintiffs' ability to destroy diversity jurisdiction under 28 U.S.C. § 1332 and defeat removal under 28 U.S.C. § 1441. The Ninth Circuit's interpretation of fraudulent misjoinder wrongly restricts defendants' right to remove an action to federal court. Under the Ninth Circuit's decision, plaintiffs with claims solely against diverse defendants can avoid federal diversity jurisdiction by improperly joining other plaintiffs who allege claims against non-diverse defendants, even though the plaintiffs have no connection with each other.

In this mass tort product liability action, 58 Mississippi citizens (47 users of products containing phenylpropanolamine ("PPA") and 11 spouses), jointly filed a complaint in Mississippi state court against 16 manufacturers and 13

retailers of various PPA-containing products. All defendants were diverse to the Mississippi plaintiffs except for four retailer defendants. Of the 58 plaintiffs, only nine asserted a claim against a non-diverse retailer defendant. The remaining 49 plaintiffs were diverse from the manufacturer(s) and any retailer against whom they asserted claims.[2] None of the plaintiffs alleged any connection with any other plaintiff (except spouses).

Under 28 U.S.C. §§ 1332 and 1441, Defendant Bayer Corporation ("Bayer") removed the state court action to the United States District Court for the Southern District of Mississippi based on the federal court's diversity jurisdiction. In its removal notice, Bayer alleged fraudulent joinder of the four non-diverse retailer defendants and improper joinder of parties. Specifically, Bayer alleged that plaintiffs who alleged claims solely against diverse manufacturing defendants were improperly joined with plaintiffs alleging claims against non-diverse retailer defendants. Further, Bayer alleged that the non-diverse retailer defendants were fraudulently and improperly joined because a number of plaintiffs did not assert a claim against a non-diverse defendant. Pet. App. F at 48a.

Plaintiffs moved for remand, or alternatively, for severance and remand of the claims of plaintiffs who asserted claims against a non-diverse defendant. The action was subsequently transferred to a multi-district litigation proceeding in the United States District Court for the Western District of Washington ("MDL Court").

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[2] Citizenship of defendants sued under fictitious names is disregarded. 28 U.S.C. § 1441 (a).

Prior to the transfer of this action to the MDL Court, the MDL Court determined that in the PPA multi-district litigation all plaintiffs in multi-plaintiff actions were improperly joined under Fed. R. Civ. P. 20 because the multi-plaintiff cases did not seek relief arising from the same transaction or occurrence. Thus, the MDL Court issued Case Management Order 15 ("CMO") holding that severance was proper and ordering plaintiffs in multi-plaintiff actions to file individual complaints. The CMO required all newly docketed multi-plaintiff complaints to file severed complaints within 30 days of being docketed in the MDL.

Following the transfer of this action to the MDL, plaintiffs renewed their motion for remand. Bayer opposed the motion because of the fraudulent joinder of non-diverse retailer defendants, citing the MDL Court's orders denying remand in ten similar actions. The MDL Court agreed with Bayer and denied plaintiffs' motion for remand, holding that the non-diverse defendants were fraudulently joined because plaintiffs had failed to state a cause of action against them. Accordingly, complete diversity existed among the parties. The MDL Court did not discuss the issue of improper joinder of the plaintiffs and of non-diverse defendants.

When plaintiffs failed to timely comply with CMO 15, their multi-plaintiff action and late-filed individual actions were dismissed. Fifty-four of the 58 plaintiffs appealed to the United States Court of Appeals for the Ninth Circuit. On appeal, plaintiffs raised two issues: (1) whether the MDL Court lacked subject matter jurisdiction over their claims, and (2) whether the MDL Court abused its discretion in dismissing their claims. Defendants maintained that the MDL Court properly held that federal diversity jurisdiction existed because the non-diverse retailer defendants were fraudulently joined. Further, defendants explained that the MDL Court's

determination in CMO 15 that plaintiffs in multi-plaintiff actions – such as this one – were improperly joined was not in dispute. Therefore, because of plaintiffs' improper joinder, the jurisdictional issue only affected the eight plaintiffs-appellants who asserted claims against non-diverse defendants and not the remaining 46 plaintiffs-appellants.[3]

The United States Court of Appeals for the Ninth Circuit reversed and remanded with instructions to vacate the dismissals and remand the entire action to Mississippi state court "in the form it was at the time of removal." Thus, the instructions included remanding plaintiffs who had not appealed the dismissal of their claims. The Ninth Circuit held that the MDL Court lacked jurisdiction because the non-diverse defendants were not fraudulently joined and complete diversity did not exist. The Ninth Circuit also rejected the defendants' improper joinder argument by stating: "No basis appears in the record or in our case law for severing the claims of the eight plaintiffs who have named non-diverse defendants."

Defendants-appellees filed a Petition for Rehearing explaining that: (1) Bayer's Notice of Removal raised the improper joinder issue; (2) Plantiffs' Motion to Remand addressed the improper joinder issue; and (3) plaintiffs never objected to CMO 15, which determined that plaintiffs in PPA multi-plaintiff actions were improperly joined. The Ninth Circuit denied the Petition for Rehearing.

The Ninth Circuit denied Petitioner Bayer's motion for stay or recall of mandate, which sought stay of execution and

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[3] One of the plaintiffs asserting claims against a non-diverse defendant did not appeal.

enforcement of the judgment, or recall and stay of the mandate, pursuant to 28 U.S.C. § 2101(f) and FRAP 41.[4] On July 14, 2006, Petitioners filed in this Court an application for stay of judgment pending this Court's review. This Court has jurisdiction to review the Ninth Circuit's decision, notwithstanding that the court of appeals' mandate has issued and the case has been remanded to state court. *Aetna Cas. & Sur. Co. v. Flowers*, 330 U.S. 464, 466-67 (1947) (construing predecessor statute to 28 U.S.C. § 1447(d)).

REASONS FOR GRANTING THE PETITION

This case presents an important issue of federal law on which the Circuits are split. Under the Ninth Circuit's rationale, plaintiffs whose claims would otherwise be removable may destroy a defendant's right to remove by the expedient of improper joinder. Any number of plaintiffs asserting claims only against diverse defendants may defeat removal simply by improperly joining with a single plaintiff asserting a claim against a non-diverse defendant. The Ninth Circuit would ignore that the claims do not arise from the same transaction or occurrence and that there is improper joinder of plaintiffs and of defendants. The Ninth Circuit's decision directly conflicts with the Eleventh and Fifth Circuits' decisions that such misjoinder is no less "fraudulent" than fraudulent joinder, which this Court long ago held may not defeat a defendant's right to a federal forum.

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[4] On Bayer's motion, the MDL Court stayed the remand pending the Ninth Circuit's ruling on Bayer's motion for stay or recall of mandate. In its order, the MDL Court incorrectly stated that the defendants did not raise the improper joinder issue.

The Court should resolve this important jurisdictional issue, which affects defendants' fundamental right to removal. To allow the Ninth Circuit's decision to stand would encourage plaintiffs in future cases, especially in "mass tort" cases, to improperly join their claims to avoid federal jurisdiction. The issue is far from an isolated one, having arisen in numerous district courts, scattered throughout the Circuits, with differing results. Congress granted defendants the right to have disputes resolved in a federal court where the citizenship of the parties is diverse. A uniform rule is needed to preserve that important statutory right.

I. THE NINTH CIRCUIT'S DECISION DIRECTLY CONFLICTS WITH OTHER CIRCUITS' DECISIONS.

The Ninth Circuit's decision directly conflicts with decisions of both the Fifth Circuit and the Eleventh Circuit, the only other Circuits that have addressed the issue. *See, e.g., In re Benjamin Moore & Co.*, 309 F.3d 296, 298 (first petition for mandamus), 318 F.3d 626, 630 (5th Cir. 2002) (second petition for mandamus); *Tapscott v. MS Dealer Serv. Corp.*, 77 F.3d 1353 (11th Cir. 1996), *abrogated on other grounds by Cohen v. Office Depot, Inc.*, 204 F.3d 1069, 1072-75 (11th Cir. 2000).

In *Tapscott*, 77 F.3d at 1355, 1360, plaintiffs who sued diverse and non-diverse defendants alleging fraud from the sale of automobile service contracts ("the automobile class") joined with plaintiffs who sued only diverse defendants alleging fraud from the sale of retail products service contracts ("the merchant class"). A diverse defendant as to the merchant class claims removed. The district court held that the defendants were improperly joined. Thus, the district court disregarded the citizenship of the improperly joined

parties, asserted jurisdiction, and severed and remanded the remainder of the action. *Id.*

The Eleventh Circuit rejected Appellants' argument that a "misjoinder, no matter how egregious, is not fraudulent joinder," and affirmed. *Id.* The court explained:

> Misjoinder may be just as fraudulent as the joinder of a resident defendant against whom a plaintiff has no possibility of a cause of action. A defendant's "right of removal cannot be defeated by a fraudulent joinder of a resident defendant having no real connection with the controversy." *Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92, 97, 42 S. Ct. 35, 37, 66 L. Ed. 144 (1921).

Id. Finding there was "no real connection" between the automobile class non-diverse defendant and the merchant class controversy, the Eleventh Circuit held that the joinder attempted in the case before it was so "egregious" that it constituted fraudulent joinder. *Id.* Accordingly, it severed the claims of the automobile class (who asserted claims against a non-diverse defendant) from those of the merchant class (who asserted claims only against diverse defendants) and remanded only the former. *Id.*

The Eleventh Circuit has applied the fraudulent misjoinder rule once since *Tapscott*, but held in that case that there was no fraudulent misjoinder. *Triggs v. John Crump Toyota, Inc.*, 154 F.3d 1284, 1287-90 (11th Cir. 1998). A plaintiff brought a class action against a diverse defendant and a non-diverse defendant, alleging a fraudulent leasing scheme. Applying the rule that only the citizenship of the named parties is considered, the court of appeals held the non-diverse defendant was not fraudulently joined. It found that, unlike

in *Tapscott*, where there were two distinct classes of plaintiffs that had no connection, there was only one class of plaintiffs, seeking joint liability, in the class action before it. *Id.* at 1289-90.

The Fifth Circuit has approved the fraudulent misjoinder doctrine, though it has not applied it. *In re Benjamin Moore & Co.*, 309 F.3d 296, 298 (first petition for mandamus), 318 F.3d 626, 630 (5th Cir. 2002) (second petition for mandamus). Seventeen unrelated plaintiffs brought a lead paint product liability action against diverse manufacturers and distributors and non-diverse retailers. Defendants removed on fraudulent joinder and misjoinder grounds, alleging that only four plaintiffs asserted claims that related to a non-diverse defendant. The district court granted remand, refusing to consider the defendants' fraudulent misjoinder argument. *Id.* at 309; *Id.* at 629. The Fifth Circuit denied defendants' petition for writ of mandamus, but, citing *Tapscott*, pointed out that the district court should have considered whether misjoinder of plaintiffs should have been allowed to defeat diversity jurisdiction as to the other 13 plaintiffs' claims.

After the district court reconsidered but rejected fraudulent misjoinder, defendants again petitioned for mandamus, asking the Fifth Circuit to sever and remand only the claims of plaintiffs who asserted a claim against a non-diverse retailer. The Fifth Circuit dismissed the appeal because it lacked jurisdiction to review a remand order, but stated, "[W]ithout detracting from the force of the *Tapscott* principle that fraudulent misjoinder of plaintiffs is no more permissible than fraudulent misjoinder of defendants to circumvent diversity jurisdiction, we do not reach its application in this case." *Id.* at 630-31.

The Ninth Circuit's decision in this case created a split in the Circuits. The Ninth Circuit rejected the fraudulent misjoinder doctrine on essentially similar facts as in *Tapscott* and *Benjamin Moore*. In this case, each plaintiff asserted an individual claim against a manufacturer, and in some claims, against a retailer of a PPA-containing product. Under Mississippi law, the plaintiffs were improperly joined. *Purdue Pharma, L.P. v. Estate of Heffner*, 904 So. 2d 100, 103 (Miss. 2004) (mere taking of same drug does not satisfy Miss. R. Civ. P. 20 joinder requirements; plaintiffs' claims in pharmaceutical product liability action severed). The district court had already held in the PPA MDL proceeding that plaintiffs in multi-plaintiff cases were improperly joined under Fed. R. Civ. P. 20. The plaintiffs did not contest that Order or its application to them.

Despite the clear improper joinder, the court of appeals refused to sever and remand only the plaintiffs who asserted claims against a non-diverse defendant. Instead, it allowed the 49 plaintiffs – whose claims would have been removable but for joinder with the nine plaintiffs who asserted claims against a non-diverse defendant – to defeat the defendants' right to remove their claims by the artifice of improper joinder.

On similar facts, *Tapscott* and *Benjamin Moore* reached conclusions opposite from the Ninth Circuit's. In all three cases each plaintiff's (or each class of plaintiffs') claims had "no real connection" with any other plaintiff's (or class of plaintiffs') claims. And there was no connection between the non-diverse defendant(s) against whom some plaintiffs asserted claims and the controversies of other plaintiffs who asserted claims against diverse defendants only. The Eleventh and Fifth Circuits preclude plaintiffs who assert claims only against diverse defendants from defeating removal by

improperly joining with a plaintiff who asserts a claim against a non-diverse defendant. In contrast, the Ninth Circuit permits such plaintiffs to circumvent diversity jurisdiction.

Notably, in a previous unreported decision, the Ninth Circuit assumed without deciding that the Circuit would adopt the *Tapscott* fraudulent misjoinder doctrine, and applied it, but held that the joinder of plaintiffs "was not so improper as to be considered egregious." *Cal. Dump Truck Owners Ass'n v. Cummins Engine Co., Inc.*, 24 Fed. Appx. 727, 730 (9th Cir. 2001). Here, it flatly rejected the doctrine.

II. THE COURT SHOULD SETTLE THIS IMPORTANT QUESTION OF FEDERAL JURISDICTION.

"Federal courts may, and should, take such action as will defeat attempts to wrongfully deprive parties entitled to sue in the Federal courts of the protection of their rights in those tribunals." *Ala. Great S. Ry. Co. v. Thompson*, 200 U.S. 206, 218 (1906). Therefore, this Court created the fraudulent joinder exception to the rule that complete diversity is required to satisfy diversity jurisdiction. This Court instructed, "Federal courts should not sanction devices intended to prevent a removal" and "should be equally vigilant to protect the right to proceed in the Federal court as to permit the state courts, in proper cases, to retain their own jurisdiction." *Wecker v. Nat'l Enamel & Stamping Co.*, 204 U.S. 176, 184 (1907).

In accord with these decisions, the right of removal cannot be defeated by the "device[]" of joining a non-diverse defendant "having no real connection with the controversy." *Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92, 97 (1921). Yet exactly that – and more – happened here. Fifty-eight

improperly joined plaintiffs joined a few non-diverse defendants who had no connection whatsoever with the vast majority of the plaintiffs' individual controversies. Such a device is no less fraudulent because a few of the improperly joined plaintiffs asserted a claim against one of the non-diverse defendants. Rather, it is a complete sham as to the numerous plaintiffs who asserted claims against diverse defendants only, and whose claims, but for the device of improper joinder, were removable.

Petitioners seek review of the Ninth Circuit's decision because it presents an important question of federal jurisdictional law that should be settled: whether a defendant's statutorily guaranteed right to a federal forum may be taken away by the procedural contrivance of improper joinder, as occurred below. The question goes far beyond the parties to this proceeding, however, prejudicing all defendants in cases removable but for improper joinder of parties.

The issue often occurs in "mass tort" cases where numerous plaintiffs improperly join their claims and attempt to ride the diversity-destroying coat-tails of one or a few plaintiffs who assert a claim against a non-diverse defendant. Indeed, under the Ninth Circuit's rationale, there is no limit to the number of plaintiffs who could escape federal court by such a device. In many cases, as here, permitting plaintiffs to improperly keep their claims out of federal court has a further adverse consequence: it deprives defendants of their right to a multidistrict litigation proceeding – that follows from federal jurisdiction – and takes away the efficiencies and uniformity that result from coordinated pretrial proceedings.

The circumstances of the instant case demonstrate that a uniform rule is needed. The case was properly removed to a district court in the Fifth Circuit, which has approved the

fraudulent misjoinder doctrine. If it had remained there, the district court should have severed and remanded only the claims of any plaintiffs who asserted a claim against a non-fraudulently joined non-diverse defendant. Instead, it was transferred to an MDL proceeding in a district court in the Ninth Circuit, where that court of appeals rejected the doctrine and ordered all plaintiffs remanded to Mississippi state court.

Plaintiffs who have committed improper joinder in an attempt to defeat removal should not be heard to argue that the defendant can regain its right of removal – a right improperly taken away by the sharp procedural practices of plaintiffs – by seeking severance in the state court. Imposing this burden on the defendant could result in forfeiture of the defendant's statutorily guaranteed removal right. First, there is disagreement among the district courts whether state or federal rules should apply to the fraudulent misjoinder issue in federal court. If federal rules apply, and if state court rules would not permit severance in a given case while federal rules would permit it, then the defendant would lose its removal right. Second, even if severance could be obtained in state court, removal could be precluded by the one year limit on diversity jurisdiction removal, 28 U.S.C. § 1446 (b), depending on how long it took to obtain severance. Third, removal after severance could be precluded by the voluntary-involuntary rule, which permits removal of an initially non-removable case only if a voluntary act of the plaintiff makes it removable.

The importance of the fraudulent misjoinder issue is demonstrated by the disarray among the 20 or more district courts, including courts in most of the Circuits, that have considered the issue in over 45 decisions, often without guidance from their court of appeals. Many district courts

have adopted and applied the doctrine in one form or another, though disagreeing on whether misjoinder must be "egregious" to be fraudulent, whether state or federal rules of joinder should govern, and whether the proper response is dismissal or severance and remand of plaintiffs over whose claims it lacks jurisdiction. For example:

> Second Circuit. *In re Rezulin Prods. Liab. Litig.*, 168 F. Supp. 2d 136, 147-48 (S.D.N.Y. 2001) (rejecting *Tapscott's* "egregiousness" standard but finding misjoinder of plaintiffs, and severing and remanding plaintiff with diversity-destroying claim "for purposes of maintaining the defendants' right to removal of the remainder of the action").
>
> Third Circuit. *In re Diet Drugs Prods. Liab. Litig.*, 294 F. Supp. 2d 667, 673, 678 (E.D. Pa. 2003) (following *Tapscott* and finding egregious and fraudulent misjoinder of plaintiffs, and dismissing plaintiffs with diversity-destroying claims).
>
> Fourth Circuit. *Grennell v. Western S. Life Ins. Co.*, 298 F. Supp. 2d 390, 395-400 (S.D.W. Va. 2004) (adopting *Rezulin* court's reasoning, finding fraudulent joinder of 2,200 plaintiffs and of non-diverse defendants against whom many plaintiffs had no claim, and holding that the proper remedy was severance rather than dismissal; "The Court can see no logic in prohibiting plaintiffs from defeating diversity jurisdiction by fraudulently joining nondiverse defendants, but allowing them to do so through fraudulently joining nondiverse plaintiffs"); *Ashworth v. Albers Med., Inc.*, 395 F. Supp. 2d 395, 410-13 (S.D.W. Va. 2005) (finding a plaintiff fraudulently misjoined a non-diverse defendant against

whom it asserted a "legally and factually ... remote" claim, and severing and remanding that claim).

Fifth Circuit. *Reed v. American Med. Sec. Group, Inc.*, 324 F. Supp. 2d 798, 803-05 (S.D. Miss. 2004) (severing and remanding claims of fraudulently misjoined plaintiffs; "The premise which underlies the concept of fraudulent misjoinder is that diverse defendants ought not be deprived of their right to a federal forum by such a contrivance as this"); *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d 563, 648-54 (S.D. Tex. 2005) (finding "egregious" misjoinder of plaintiffs, but remanding because all plaintiffs asserted claims against a non-diverse defendant; *Barron v. Miraglia*, 2004 WL 1933225, at *2 (N.D. Tex. Aug. 30, 2004) (unreported) (holding that fraudulent misjoinder must be "totally unsupported or egregious" and finding no fraudulent misjoinder).

Sixth Circuit. *Asher v. Minnesota Mining and Mfg. Co.*, 2005 WL 1593941, at *5-8 (E.D. Ky. June 30, 2005) (unreported) (adopting doctrine but recognizing that standards are not clear, including applicability of "egregious" or simple misjoinder standard and of federal or state joinder rules; finding misjoinder and ordering discovery to determine which plaintiffs asserted a claim against a non-diverse retailer, so that court could sever and remand such claims).

Seventh Circuit. *In re Bridgestone/Firestone, Inc.*, 260 F. Supp. 2d 722, 727-31 (S.D. Ind. 2003) (defining fraudulent misjoinder as joining of claims without sufficient factual nexus to satisfy the permissive joinder standard, and finding no fraudulent misjoinder).

Eighth Circuit. *In re Baycol Prods. Liab. Litig.*, 2003 WL 22341303, at *3-4 (D. Minn. 2003) (unreported) (adopting doctrine, finding fraudulent misjoinder, and severing and remanding the claim of the only plaintiff who asserted a claim against a non-diverse defendant); *In re Prempro Prods. Liab. Litig.*, 417 F. Supp. 2d 1058, 1060 (E.D. Ark. 2006) (finding fraudulent misjoinder and dropping non-diverse plaintiffs without prejudice to re-filing; noting that in MDL litigation, "the non-diverse plaintiff is typically misjoined for the purpose of defeating diversity").

Ninth Circuit. *Greene v. Wyeth*, 344 F. Supp. 2d 674, 683-85 (D. Nev. 2004) (adopting doctrine but rejecting "egregiousness" standard in favor of severance where joinder "is procedurally inappropriate and accomplishes no other objective than the manipulation of the forum"; finding improper joinder and severing and remanding claims of plaintiffs who asserted a claim against a non-diverse defendant); *see also Brazina v. Paul Revere Ins. Co.*, 271 F. Supp. 2d 1163, 1172 (N.D. Cal. 2003) (holding that if the court were to apply *Tapscott*, it would not find "egregious" misjoinder where plaintiff's claims had "enough of a connection").

Eleventh Circuit. *Rudder v. K Mart Corp.*, 1997 WL 907916, at *5-6 (S.D. Ala. Oct. 15, 1997) (unreported) (finding fraudulent misjoinder of plaintiffs where joinder was a "sham" and "collusive").

Other district courts have rejected the improper joinder (fraudulent misjoinder) doctrine. *See, e.g., Osborn v. Metro. Life Ins. Co.*, 341 F. Supp. 2d 1123, 1127 (E.D. Cal. 2004)

(rejecting doctrine because it would introduce procedural complexity and because of "uncertainty as to how such a theory should be applied"); *Rutherford v. Merck & Co.*, 2006 WL 1064971, at *7-11 (S.D. Ill. April 21, 2006) (unreported) (rejecting doctrine because "[n]othing in the jurisprudence of the Supreme Court of the United States regarding fraudulent joinder suggests that the joinder of non-fraudulent claims is a question that implicates the subject matter jurisdiction of a federal court" and because of policy favoring "simple, easy-to-apply jurisdictional rules," noting "enormous judicial confusion engendered by the doctrine" and predicting that "no clear standards for the application of the *Tapscott* doctrine" will emerge).

The importance of the doctrine has been noted by the commentators. Authors of a leading federal procedure text refer to it as procedural misjoinder and have stated that it may represent a third type of fraudulent joinder (in addition to outright fraud in pleadings, and lack of claim against a joined party). *See* 14B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3723 (3d ed. 1998) ("[a] new concept ... appears to be part of the doctrine of fraudulent joinder [and] has begun to emerge in the case law ...."); *see also* E. Farish Percy, *Defining the Contours of the Emerging Fraudulent Misjoinder Doctrine*, 29 Harv. J.L. & Pub. Pol'y 569, 570, 574 (2006) (advocating doctrine; noting "the current lack of clarity and uniformity concerning the doctrine's application"); Laura Hines and Steven Gensler, *Driving Misjoinder: The Improper Party Problem in Removal Jurisdiction*, 57 Ala. L. Rev. 779, 783 (2006) (advocating doctrine; noting the "muddled" state of fraudulent misjoinder case law).

Petitioners respectfully submit that this Court should provide guidance to the lower courts on this important – and

wrongly decided – question of federal subject matter jurisdiction. Like fraudulent joinder, fraudulent misjoinder is an "attempt[] to wrongfully deprive parties entitled to sue in the Federal courts of the protection of their rights in those tribunals." *See Thompson*, 200 U.S. at 218. This Court's precedent teaches that such "devices" should not be sanctioned. The Court should grant certiorari review to avoid a substantial erosion of the important jurisdictional principle of fraudulent joinder.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 04-35875

[Filed March 13, 2006]

In re: PHENYLPROPANOLAMINE (PPA) PRODUCTS LIABILITY LITIGATION, This appeal relates to the cases listed in Exhibit A,	)
JAMES E. ANDERSON; et al.,	)
Plaintiffs - Appellants,	)
v.	)
BAYER CORPORATION; et al.,	)
Defendants - Appellees.	)

Appeal from the Untied States District Court
for the Western District of Washington
Barbara Jacobs Rothstein, District Judge, Presiding
D.C. No. MD-01-01407-BJR

Argued and Submitted February 7, 2006
Seattle, Washington

Before: D.W. NELSON, RYMER, and FISHER, Circuit Judges.

MEMORANDUM*

(This memorandum applies to the parties listed in Exhibit A)

James E. Anderson, et al. appeal from the district court's dismissal of their action, arguing that removal jurisdiction is lacking. We agree, and reverse.

Bayer, whose burden it is to establish removal jurisdiction, *California ex rel. Lockyer v. Dynegy, Inc.*, 375 F.3d 831, 838, *amended by* 387 F.3d 966 (9th Cir. 2004), did not show that the joint complaint obviously fails to state a cause of action under Mississippi law against resident defendants, *see McCabe v. Gen. Foods Corp.*, 811 F.2d 1336, 1339 (9th Cir. 1987) (establishing standard for fraudulent joinder). No evidence was presented to pierce the pleadings, therefore we look only to the allegations in the complaint. Assuming (without needing to decide) that Mississippi requires knowledge on the part of retailers or pharmacists, paragraphs 70, 73 and 118 of the complaint sufficiently aver it for purposes of notice pleading. Miss. R. Civ. P. 8(a). We are not obliged to follow federal district court decisions upon which Bayer relies, but in any event do not read them as controlling here given the specific allegations in Anderson's complaints.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

No basis appears in the record or in our case law for severing the claims of the eight plaintiffs who have named non-diverse defendants. Accordingly, we reverse and remand to the district court with instructions to vacate its dismissal orders and its order to file individualized complaints, as both were without jurisdiction, and to order the action, in the form it was at the time of removal, remanded to state court.

Given this disposition, it is unnecessary to reach Anderson's alternative argument that the complaints should not have been dismissed for that issue is moot.

REVERSED AND REMANDED.

EXHIBIT A

	Plaintiff Name	Case Name	State	MDL Case No.	Former Case No.
1.	Anderson, Jr., James	*James Anderson, Jr. v. Bayer Corp.* (Originally in *James E. Anderson, et al. v. Bayer Corp. et al.*)	MS	C04-1058	C04-0022
2.	Anderson, James E.	*James E. Anderson v. Bayer Corp.* (Originally in *James E. Anderson, et al. v. Bayer Corp. et al.*)	MS	C04-1449	C04-0022
3.	Anderson, John R.	*John R. Anderson v. Bayer Corp.* (Originally in *James E. Anderson, et al. v. Bayer Corp. et al.*)	MS	C04-1059	C04-0022
4.	Archer, Jack	*Jack Archer v. Bayer*	MS	C04-1060	C04-0022

	Plaintiff Name	Case Name	State	MDL Case No.	Former Case No.
		Corp. (Originally in *James E. Anderson, et al. v. Bayer Corp. et al.*)			
5.	Bailey, Dorothy	*Dorothy Bailey v. Bayer Corp. et al.* (Originally in *James E. Anderson, et al. v. Bayer Corp. et al.)*	MS	C04-1062	C04-0022
6.	Bailey, Louis	*Louis Bailey v. Bayer Corp.* (Originally in *James E. Anderson, et al. v. Bayer Corp. et al.*)	MS	C04-1061	C04-0022
7.	Barkley, Sheila	*Sheila Barkley v. Block, et al.* (Originally in *James E. Anderson, et*	MS	C04-1063	C04-0022

Plaintiff Name	Case Name	State	MDL Case No.	Former Case No.
	al. v. Bayer Corp. et al.)			
8. Bradham, Kathy	*Kathy Bradham v. Bayer Corp.* (Originally in *James E. Anderson, et al. v. Bayer Corp. et al.*)	MS	C04-1064	C04-0022
9. Butler, Eddie	*Eddie Butler v. Bayer Corp.* (Originally in *James E. Anderson, et al. v. Bayer Corp. et al.*)	MS	C04-1065	C04-0022
10. Carter, Ethel	*Ethel Carter v. Bayer Corp.* (Originally in *James E. Anderson, et al. v. Bayer Corp. et al.*)	MS	C04-1066	C04-0022
11. Dale, Ernestine	*Ernestine Dale v.*	MS	C04-1068	C04-0022

Plaintiff Name	Case Name	State	MDL Case No.	Former Case No.
	Bayer Corp. (Originally in *James E. Anderson, et al. v. Bayer Corp. et al.*)			
12. Elmore, Elizabeth	*Elizabeth Elmore v. Bayer Corp.* (Originally in *James E. Anderson, et al. v. Bayer Corp. et al.*)	MS	C04-1070	C04-0022
13. Green, Robert	*Robert Green v. Wyeth* (Originally in *James E. Anderson, et al. v. Bayer Corp. et al.*)	MS	C04-1450	C04-0022
14. Harris, Daisy	*Daisy Harris v. Bayer Corp., et al.* (Originally in *James E. Anderson, et al. v. Bayer Corp. et*	MS	C04-1048	C04-0022

Plaintiff Name	Case Name	State	MDL Case No.	Former Case No.
	al.)			
15. Henard, Leeida	*Leeida Henard v. Bayer Corp.* (Originally in *James E. Anderson, et al. v. Bayer Corp. et al.*)	MS	C04-1072	C04-0022
16. Hendry, Robert	*Robert Hendry v. AHP* (Originally in *James E. Anderson, et al. v. Bayer Corp. et al.*)	MS	C04-1073	C04-0022
17. Jacob, Dollas	*Dollas Jacob v. Bristol Myers Squibb* (Originally in *James E. Anderson, et al. v. Bayer Corp. et al.*)	MS	C04-1074	C04-0022
18. King, Ollie L.	*Ollie L. King v. Bayer Corp.* (Originally in	MS	C04-1075	C04-0022

Plaintiff Name	Case Name	State	MDL Case No.	Former Case No.
	James E. Anderson, et al. v. Bayer Corp. et al.)			
19. Lang, James	*James Lang v. Block et al.* (Originally in *James E. Anderson, et al. v. Bayer Corp. et al.*)	MS	C04-1076	C04-0022
20. Magee, William C.	*William C. Magee v. Bayer Corp.* (Originally in *James E. Anderson, et al. v. Bayer Corp. et al.*)	MS	C04-1077	C04-0022
21. Maier, Glen	*Glen and Paula Maier v. Bayer AG*	MS	C04-1451	C04-0022
22. Maier, Paula	*Glenn and Paula Maier v. Bayer AG*	MS	C04-1451	C04-0022
23. Marshall, Mildred	*Mildred Marshall v. Bayer Corp.* (Originally in	MS	C04-1034	C04-0022

Plaintiff Name	Case Name	State	MDL Case No.	Former Case No.
	James E. Anderson, et al. v. Bayer Corp. et al.)			
24. Merrick, Belain	*Belain Merrick v. Block* (Originally in *James E. Anderson, et al. v. Bayer Corp. et al.*)	MS	C04-1255	C04-0022
25. Mitchell, Valerie	*Valerie Mitchell v. Block, et al.* (Originally in *James E. Anderson, et al. v. Bayer Corp. et al.*)	MS	C04-1035	C04-0022
26. Netterville, Charles	*Charles and Melanie Netterville v. Procter & Gamble, et al.* (Originally in *James E. Anderson, et al. v.*	MS	C04-1256	C04-0022

Plaintiff Name	Case Name	State	MDL Case No.	Former Case No.
	Bayer Corp. et al.)			
27. Netterville, Melanie	*Charles and Melanie Netterville v. Procter & Gamble, et al.* (Originally in *James E. Anderson, et al. v. Bayer Corp. et al.*)	MS	C04-1256	C04-0022
28. Nickelson, Veronica	*Veronica Nickelson v. McNeil* (Originally in *James E. Anderson, et al. v. Bayer Corp. et al.*)	MS	C04-1036	C04-0022
29. Pace, LilAnn	*LilAnn Pace v. Wyeth, et al.* (Originally in *James E. Anderson, et al. v. Bayer Corp. et al.*)	MS	C04-1037	C04-0022
30. Pickering, Joy	*Joy Pickering*	MS	C04-	C04-

Plaintiff Name	Case Name	State	MDL Case No.	Former Case No.
	v. Block, et al. (Originally in *James E. Anderson, et al. v. Bayer Corp. et al.*)		1038	0022
31. Pritchard, Elizabeth	*Elizabeth Pritchard v. Wyeth* (Originally in *James E. Anderson, et al. v. Bayer Corp. et al.*)	MS	C04-1039	C04-0022
32. Schuette, Edward	*Edward Schuette v. Bayer Corp., et al.* (Originally in *James E. Anderson, et al. v. Bayer Corp. et al.)*	MS	C04-1040	C04-0022
33. Smith, Levi	*Levi Smith v. Bayer Corp.* (Originally in *James E.*	MS	C04-1041	C04-0022

Plaintiff Name	Case Name	State	MDL Case No.	Former Case No.
	Anderson, et al. v. Bayer Corp. et al.)			
34. Thompson, Willie	*Willie Thompson v. Bayer Corp.* (Originally in *James E. Anderson, et al. v. Bayer Corp. et al.*)	MS	C04-1042	C04-0022
35. Twyner, Shraon	*Sharon Twyner v. Bayer Corp., et al.* (Originally in *James E. Anderson, et al. v. Bayer Corp. et al.*)	MS	C04-1044	C04-0022
36. Vaughn, Alfanette	*Alfanette Vaughn v. GlaxoSmith Kline* (Originally in *James E. Anderson, et al. v. Bayer Corp.*	MS	C04-1346	C04-0022

Plaintiff Name	Case Name	State	MDL Case No.	Former Case No.
	et al.)			
37. Warren, Della	*Della Warren v. Bayer Corp., et al.* (Originally in *James E. Anderson, et al. v. Bayer Corp. et al.*)	MS	C04-1045	C04-0022
38. Washington, Lois	*Lois Washington v. Bayer Corp., et al.* (Originally in *James E. Anderson, et al. v. Bayer Corp. et al.*)	MS	C04-1046	C04-0022
39. Washington, Shawanda	*Shawanda Washington v. Bayer Corp.* (Originally in *James E. Anderson, et al. v. Bayer Corp. et al.)*	MS	C04-1047	C04-0022
40. Welch, Charles	*Charles Welch v. Bayer*	MS	C04-1049	C04-0022

Plaintiff Name	Case Name	State	MDL Case No.	Former Case No.
	Corp. (Originally in *James E. Anderson, et al. v. Bayer Corp. et al.*)			
41. Wells, Patricia	*Patricia Wells v. Bayer Corp. et al.* (Originally in *James E. Anderson, et al. v. Bayer Corp. et al.*)	MS	C04-1050	C04-0022
42. Wicks, Martha	*Martha Wicks v. Wyeth* (Originally in *James E. Anderson, et al. v. Bayer Corp. et al.*)	MS	C04-1051	C04-0022
43. Williams, Nathaniel	*Nathaniel Williams v. Bayer Corp.* (Originally in *James E. Anderson, et al. v. Bayer Corp.*	MS	C04-1053	C04-0022

Plaintiff Name	Case Name	State	MDL Case No.	Former Case No.
	et al.)			
44. Wilson, Roger Dale	*Roger Dale Wilson v. Bayer Corp.* (Originally in *James E. Anderson, et al. v. Bayer Corp. et al.*)	MS	C04-1054	C04-0022
45. Woods, Delores	*Delores Woods v. Bayer Corp.* (Originally in *James E. Anderson, et al. v. Bayer Corp. et al.*)	MS	C04-1055	C04-0022
46. James E. Anderson, Mildred Marshall, Valerie Mitchell, Veronica Nickelson, Lillian Pace, Joy and Judd Pickering, Elizabeth Pritchard,	*James E. Anderson, et al. v. Bayer Corp. et al.*	MS		C04-0022

Plaintiff Name	Case Name	State	MDL Case No.	Former Case No.
Edward Schuette, Levi and Marjorie Smith, Willie and Mae Thompson, Sharon Twyner, Della Warren, Lois Washington, Shawanda Washington, Daisy Harris, Charles Welch, Patricia Wells, Martha Wicks, Nathaniel and Bobbie Williams, Roger and Wilma Wilson, Delores Woods, James Anderson, John Anderson, Jack Archer, Louis and Barbara Bailey, Dorothy Bailey-Banks, Sheila				

Plaintiff Name	Case Name	State	MDL Case No.	Former Case No.
Barkley, Kathy				
Bradham, Eddie				
Butler, Ethel				
Carter, Ernestine and M. J.				
Dale, Elizabeth				
Elmore, Leeida				
Henard, Robert				
Hendry, Dollas and Eugene Jacob, Ollie				
King, James				
Lang, William and Rosie				
Magee, Belain				
Merrick, Melanie and Charles				
Netterville, Alfanette				
Vaughn, Robert				
Green, Glen and Paula Maier.				

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MDL NO. 1407

[Filed August 23, 2004]

IN RE: PHENYLPROPANOLAMINE (PPA) PRODUCTS LIABILITY LITIGATION,	)
This document relates to:	)
See Appendices A and B	)

ORDER GRANTING DEFENDANTS' JUNE 4, 2004 MOTION TO DISMISS WITH PREJUDICE FOR FAILURE COMPLY WITH CMOs 15 AND 15A

On June 4, 2004 defendant Bayer Corporation, on behalf of all defendants, filed a motion to dismiss with prejudice plaintiffs listed in Appendices A and B (among others) for failure to comply with this court's Case Management Orders (CMOs) 15 and 15A. Having reviewed the briefs filed in support of and in response to that motion, the court finds and rules as follows:

I. DISCUSSION

A. Standard For Dismissal for Failure to Comply with Court Order

As the court has discussed on previous occasions, in determining whether to dismiss a claim for failure to comply with a court order, a district court must consider five factors: (1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to the defendants; (4) the public policy favoring disposition of cases on their merits; and (5) the availability of less drastic sanctions. *See* May 7, 2004 Order of Dismissal With Prejudice for Failure to Comply With CMO Nos. 15 and 15A, *citing Pagtalunan v. Galaza,* 291 F.3d 639, 642 (9th Cir. 2002). Under the same analysis articulated in the May 7, 2004 order, the court finds that absent special circumstances, dismissal in these cases is warranted.

B. Whether the Original Multi-Plaintiff Complaints Listed on Appendix B Should Be Dismissed

Defendants seek dismissal of the original multi-plaintiff complaints listed on Appendix B attached hereto. Again, as this court stated in its May 7, 2004 Order, dismissal of these complaints is appropriate under CMO 15A, which provides that "after all applicable deadlines set forth in CMO 15 have elapsed, defendant may move for the dismissal of the original multi-plaintiff complaint[.]" *See* May 7, 2004 Order, *citing* CMO No. 15A, ¶3. Plaintiffs do not dispute that "all applicable deadlines" have passed, and the motion to dismiss the original multi-plaintiff complaints listed on Appendix B is granted.

Several plaintiffs appear to object to this aspect of defendants' motion, claiming that their original complaint should not be dismissed because they did, in fact, file timely individual severed complaints.[1] To clarify, dismissal of the original multi-plaintiff complaints is not a sanction, *per* se, for any "violation" of CMOs 15 or 15A. It is simply an administrative procedure the court has implemented to eliminate non-viable complaints from its docket. The court is well aware that the plaintiffs listed in footnote 1 have properly filed their individual complaints. Nevertheless, dismissal of the original multi-plaintiff complaints at this time is appropriate.

C. Other Individual Plaintiffs' Responses

Several plaintiffs have responded to defendants' motion individually. The court will address these arguments in turn.

A number of plaintiffs were erroneously included on defendants' original appendices, and this error has been brought to the court's attention by both sides; the plaintiffs are not included in this court's order.[2] A number of other objecting plaintiffs belong to cases in which a stay has been

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[1] *See* "Plaintiffs' Response in Opposition to Bayer's Motion for Dismissal With Prejudice for Cases in Which Plaintiffs Filed Untimely or No Individual Complaints Under CMOs 15 and 15A." The original multi-plaintiff complaint, *Minnie Swift, et al. v.* Bayer *Corporation, et al.*, C04-710, included plaintiffs Dorothy Bowie, Robert Davis, Curtis Deason, Eddie Gayden, Ellen Ruth Grayson, Susan Holloway, James Redmond, and Minnie Swift, all of whom subsequently filed timely individual complaints.

[2] These plaintiffs include Kathleen Kanouff, Kevin Fisher, Amy George, Geneva Benton and Viola Pitt.

entered.[3] All motions as to these cases have been stricken pursuant to the court's July 16, 2004 minute order, and both parties' arguments as to these plaintiffs are therefore moot.

Finally, a number of plaintiffs have filed essentially identical oppositions to defendants' motion, asserting a number of arguments.[4] None of these arguments are availing; indeed, one of them approaches what the court considers Rule 11 frivolity. Specifically, plaintiffs argue that since CMO 15A allows a plaintiff 30 days to cure a timely individual complaint to which a defendant has objected to as deficient, plaintiffs here are entitled to a 30-day "safe harbor" after defendants' objection (in the form of this motion) in which to file their first individual severed complaint. Almost (but unfortunately not quite) needless to say, that provision applies to timely-filed but deficient complaints, and to provide for the correction thereof, and not even arguably to complaints that were filed grossly late or not at all.

The court previously addressed the remainder of plaintiffs' arguments in its May 7, 2004 Order, and will not reiterate the analysis here. In short, the court rejects plaintiffs' assertion that dismissal is too harsh a sanction for failure to comply with the court's order. Plaintiffs filed their complaints, if at all, months late. Plaintiffs' only apparent excuse for this

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[3] These plaintiffs include Letitia Bohahan, Janet Sportsman, Gary Odom, Patsy Rawlings, Tracy Russell, and Shirley Sewell. A number of other cases listed on defendants' original appendices have also been stayed, and the motion as to these cases is stricken as well. This order does not relate to these cases, either, and they are also not included on the attached appendices.

[4] These plaintiffs include most of those listed on Appendix A.

failure is that their original multi-plaintiff complaint adequately put defendants on notice of the claims against them. Plaintiffs' assertion in this regard is extremely untimely and obviously *ad hoc*. More to the point, CMOs 15 and 15A simply did not contemplate this or any other unenumerated exception, and plaintiffs have given the court no reason to believe that such exception should be read in given the obvious prejudice suffered by defendants and the importance of proper case management to this highly complex MDL. Defendants' motion as to these plaintiffs, as listed on Appendix A, is granted.

II. CONCLUSION

Defendants' motion as to those cases listed in Appendix B is GRANTED, and these multi-plaintiff complaints are DISMISSED with prejudice in their entirety. The motion as to those cases listed in Appendix A, which includes untimely-filed individual complaints, is also GRANTED, and these cases are DISMISSED as well.

DATED at Seattle, Washington this 23rd day of August, 2004.

s/ Barbara Jacobs Rothstein
BARBARA JACOBS ROTHSTEIN
UNITED STATES DISTRICT JUDGE

See Fold-Out Exhibit

Revised Appendix A - Plaintiffs That Filed an Untimely CMO-15 Complaint

Revised Appendix A – Plaintiffs That Filed an Untimely CMO-15 Complaint

1.	Anderson, Jr.- James	*James Anderson, Jr. v. Bayer Corp.* (Originally in *James E. Anderson, et al. v. Bayer Corp., et al.*)	MS	C04-1058	C04-0022	02/11/2004	05/07/2004
2.	Anderson, James E.	*James E. Anderson v. Bayer Corp.* (Originally in *James E. Anderson, et al. v. Bayer Corp., et al.*)	MS	C04-1449	C04-0022	02/11/2004	06/23/2004
3.	Anderson- John R.	*John R. Anderson v. Bayer Corp.* (Originally in *James E. Anderson, et al. v. Bayer Corp., et al.*)	MS	C04-1059	C04-0022	02/11/2004	05/07/2004
4.	Archer- Jack	*Jack Archer v. Bayer Corp.* (Originally in *James E. Anderson, et al. v. Bayer Corp., et al.*)	MS	C04-1060	C04-0022	02/11/2004	05/07/2004
5.	Bailey- Dorothy	*Dorothy Bailey v. Bayer Corp, et al.* (Originally in *James E. Anderson, et al. v. Bayer Corp., et al.*)	MS	C04-1062	C04-0022	02/11/2004	05/07/2004
6.	Bailey- Louis	*Louis Bailey v. Bayer Corp* (Originally in *James E. Anderson, et al. v. Bayer Corp., et al.*)	MS	C04-1061	C04-0022	02/11/2004	05/07/2004
7.	Barkley- Sheila	*Sheila Barkley v. Block, et al.* (Originally in *James E. Anderson, et al. v. Bayer Corp., et al.*)	MS	C04-1063	C04-0022	02/11/2004	05/07/2004
8.	Bradham- Kathy	*Kathy Bradham v. Bayer Corp.* (Originally in *James E. Anderson, et al. v. Bayer Corp., et al.*)	MS	C04-1064	C04-0022	02/11/2004	05/07/2004
9.	Butler- Eddie	*Eddie Butler v. Bayer Corp.* (Originally in *James E. Anderson, et al. v. Bayer Corp., et al.*)	MS	C04-1065	C04-0022	02/11/2004	05/07/2004
10.	Carter- Ethel	*Ethel Carter v. Bayer Corp.* (Originally in *James E. Anderson, et al. v. Bayer*	MS	C04-1066	C04-0022	02/11/2004	05/07/2004

Revised Appendix A – Plaintiffs That Filed an Untimely CMO-15 Complaint

		Corp., et al.)					
11.	Dale-Earnestine	*Earnestine Dale v. Bayer Corp.* (Originally in *James E. Anderson, et al. v. Bayer Corp., et al.*)	MS	C04-1068	C04-0022	02/11/2004	05/07/2004
12.	Elmore-Elizabeth	*Elizabeth Elmore v. Bayer Corp.* (Originally in *James E. Anderson, et al. v. Bayer Corp., et al.*)	MS	C04-1070	C04-0022	02/11/2004	05/07/2004
13.	Gooch- Emma	*Emma Gooch v. Block* (Originally in *James E. Anderson, et al. v. Bayer Corp., et al.*)	MS	C04-1071	C04-0022	02/11/2004	05/07/2004
14.	Green – Robert	*Robert Green v. Wyeth* (Originally in *James E. Anderson, et al. v. Bayer Corp., et al.*)	MS	C04-1450	C04-0022	02/11/2004	06/23/2004
15.	Harris- Daisy	*Daisy Harris v. Bayer Corp., et al.* (Originally in *James E. Anderson, et al. v. Bayer Corp., et al.*)	MS	C04-1048	C04-0022	02/11/2004	05/07/2004
16.	Henard-Leeida	*Leeida Henard v. Bayer Corp.* (Originally in *James E. Anderson, et al. v. Bayer Corp., et al.*)	MS	C04-1072	C04-0022	02/11/2004	05/07/2004
17.	Hendry-Robert	*Robert Hendry v. AHP* (Originally in *James E. Anderson, et al. v. Bayer Corp., et al.*)	MS	C04-1073	C04-0022	02/11/2004	05/07/2004
18.	Jacob- Dollas	*Dollas Jacob v. Bristol Myers Squibb* (Originally in *James E. Anderson, et al. v. Bayer Corp., et al.*)	MS	C04-1074	C04-0022	02/11/2004	05/07/2004
19.	King- Ollie L.	*Ollie L. King v. Bayer Corp.* (Originally in *James E. Anderson, et al. v. Bayer*	MS	C04-1075	C04-0022	02/11/2004	05/07/2004

Revised Appendix A – Plaintiffs That Filed an Untimely CMO-15 Complaint

		Corp., et al.)					
20.	Lang- James	*James Lang v. Block, et al.* (Originally in *James E. Anderson, et al. v. Bayer Corp., et al.*)	MS	C04-1076	C04-0022	02/11/2004	05/07/2004
21.	Magee-Merlean	*Merlean Magee v. Elan, et al.* (Originally in *James E. Anderson, et al. v. Bayer Corp., et al.*)	MS	C04-1078	C04-0022	02/11/2004	05/07/2004
22.	Magee-William C	*William C Magee v. Bayer Corp, et al.* (Originally in *James E. Anderson, et al. v. Bayer Corp., et al.*)	MS	C04-1077	C04-0022	02/11/2004	05/07/2004
23.	Maier – Glenn	*Glenn and Paula Maier v. Bayer AG*	MS	C04-1451	C04-0022	02/11/2004	06/23/2004
24.	Maier – Paula	*Glenn and Paula Maier v. Bayer AG*	MS	C04-1451	C04-0022	02/11/2004	06/23/2004
25.	Marshall-Mildred	*Mildred Marshall v. Bayer Corp.* (Originally in *James E. Anderson, et al. v. Bayer Corp., et al.*)	MS	C04-1034	C04-0022	02/11/2004	05/07/2004
26.	Merrick – Belain	*Belain Merrick v. Block* (Originally in *James E. Anderson, et al. v. Bayer Corp., et al.*)	MS	C04-1255	C04-0022	02/11/2004	05/19/2004
27.	Mitchell-Valerie	*Valerie Mitchell v. Block, et al.* (Originally in *James E. Anderson, et al. v. Bayer Corp., et al.*)	MS	C04-1035	C04-0022	02/11/2004	05/07/2004
28.	Netterville – Charles	*Charles and Melanie Netterville v. Procter & Gamble, et al.*	MS	C04-1256	C04-0022	02/11/2004	05/19/2004
29.	Netterville – Melanie	*Charles and Melanie Netterville v. Procter & Gamble, et al.*	MS	C04-1256	C04-0022	02/11/2004	05/19/2004
30.	Nickelson-Veronica	*Veronica Nickelson v. McNeil* (Originally in *James E. Anderson, et al. v. Bayer*	MS	C04-1036	C04-0022	02/11/2004	05/07/2004

Revised Appendix A – Plaintiffs That Filed an Untimely CMO-15 Complaint

		Corp., et al.)					
31.	Pace- LilAnn	*LilAnn Pace v. Wyeth, et al.* (Originally in *James E. Anderson, et al. v. Bayer Corp., et al.*)	MS	C04-1037	C04-0022	02/11/2004	05/07/2004
32.	Pickering- Joy	*Joy Pickering v. Block, et al.* (Originally in *James E. Anderson, et al. v. Bayer Corp., et al.*)	MS	C04-1038	C04-0022	02/11/2004	05/07/2004
33.	Pritchard-Elizabeth	*Elizabeth Pritchard v. Wyeth* (Originally in *James E. Anderson, et al. v. Bayer Corp., et al.*)	MS	C04-1039	C04-0022	02/11/2004	05/07/2004
34.	Schuette-Edward	*Edward Schuette v. Bayer Corp., et al.* (Originally in *James E. Anderson, et al. v. Bayer Corp., et al.*)	MS	C04-1040	C04-0022	02/11/2004	05/07/2004
35.	Smith- Levi	*Levi Smith v. Bayer Corp.* (Originally in *James E. Anderson, et al. v. Bayer Corp., et al.*)	MS	C04-1041	C04-0022	02/11/2004	05/07/2004
36.	Thompson-Willie	*Willie Thompson v. Bayer Corp.* (Originally in *James E. Anderson, et al. v. Bayer Corp., et al.*)	MS	C04-1042	C04-0022	02/11/2004	05/07/2004
37.	Trott- Brenda	*Brenda Trott v. Wyeth, et al.* (Originally in *James E. Anderson, et al. v. Bayer Corp., et al.*)	MS	C04-1043	C04-0022	02/11/2004	05/07/2004
38.	Twyner-Sharon	*Sharon Twyner v. Bayer Corp., et al.* (Originally in *James E. Anderson, et al. v. Bayer Corp., et al.*)	MS	C04-1044	C04-0022	02/11/2004	05/07/2004
39.	Vaughn – Alfanette	*Alfanette Vaughn v. GlaxoSmithKline*	MS	C04-1346	C04-0022	02/11/2004	06/8/2004
40.	Warren- Della	*Della Warren v. Bayer Corp., et al.*	MS	C04-1045	C04-0022	02/11/2004	05/07/2004

Revised Appendix A – Plaintiffs That Filed an Untimely CMO-15 Complaint

		(Originally in *James E. Anderson, et al. v. Bayer Corp., et al.*)					
41.	Washington-Lois	*Lois Washington v. Bayer Corp., et al.* (Originally in *James E. Anderson, et al. v. Bayer Corp., et al.*)	MS	C04-1046	C04-0022	02/11/2004	05/07/2004
42.	Washington-Shawanda	*Shawanda Washington v. Bayer Corp.* (Originally in *James E. Anderson, et al. v. Bayer Corp., et al.*)	MS	C04-1047	C04-0022	02/11/2004	05/07/2004
43.	Welch-Charles	*Charles Welch v. Bayer Corp.* (Originally in *James E. Anderson, et al. v. Bayer Corp., et al.*)	MS	C04-1049	C04-0022	02/11/2004	05/07/2004
44.	Wells- Patricia	*Patricia Wells v. Bayer Corp., et al.* (Originally in *James E. Anderson, et al. v. Bayer Corp., et al.*)	MS	C04-1050	C04-0022	02/11/2004	05/07/2004
45.	Wicks- Martha	*Martha Wicks v. Wyeth* (Originally in *James E. Anderson, et al. v. Bayer Corp., et al.*)	MS	C04-1051	C04-0022	02/11/2004	05/07/2004
46.	Williams-Nathaniel	*Nathaniel Williams v. Bayer Corp.* (Originally in *James E. Anderson, et al. v. Bayer Corp., et al.*)	MS	C04-1053	C04-0022	02/11/2004	05/07/2004
47.	Wilson- Roger Dale	*Roger Dale Wilson v. Bayer Corp.* (Originally in *James E. Anderson, et al. v. Bayer Corp., et al.*)	MS	C04-1054	C04-0022	02/11/2004	05/07/2004
48.	Woods-Delores	*Delores Woods v. Bayer Corp.* (Originally in *James E. Anderson, et al. v. Bayer Corp., et al.*)	MS	C04-1055	C04-0022	02/11/2004	05/07/2004

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Revised Appendix B – List of Original Multi-Plaintiff Cases

	Case Name	State	MDL Case No.	Date Docketed
1	*Anderson, James E., et al. v. Bayer Corp., et al.*	MS	C04-0022	02/11/2004
2	*Bryant, Willey O., et al. v. Wyeth, et al.*	MS	C04-0720	04/12/2004
3	*Catchings, Sylvia et al. v. Bayer Corp., et al.*	MS	C04-0711	04/08/2004
4	*Claiborne, Maria, et al. v. GSK Consumer Health*	MS	C04-0018	02/02/2004
5	*Cowart, Elliot, et al. v. Bayer Corp., et al.*	MS	C03-2484	08/18/2003
6	*Swift, Minnie, et al. v. Bayer Corp., et al.*	MS	C04-0710	04/08/2004
7	*Thigpen, James, et al. v. Bayer Corp., et al.*	MS	C04-0019	02/04/2004

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MDL No. 1407

[Filed May 5, 2004]

IN RE: PHENYLPROPANOLAMINE (PPA) PRODUCTS LIABILITY LITIGATION,	)
This document relates to:	)
See Appendix A	)

ORDER DENYING PLAINTIFFS' MOTIONS TO REMAND

THIS MATTER comes before the Court on the motions of the plaintiffs named in Appendix A ("plaintiffs") to remand their cases to state court in Mississippi and Louisiana. The plaintiffs' complaints allege numerous claims against manufacturers of PPA-containing products, as well as in-state retail stores that sold those products (collectively, "the retail defendants"). Defendants removed these actions alleging that plaintiffs fraudulently joined the retail defendants solely to defeat diversity. Plaintiffs moved to

remand to state court. The cases have been transferred to this Court as part of multi-district litigation ("MDL") No. 1407.

I. ANALYSIS

Although plaintiffs claim that each of them has sued a non-diverse retail defendant, the facts show otherwise.

The complaints of plaintiffs Donald, Gilchrist, and Oakley are bereft of any allegations against any in-state defendants.

Plaintiff Terry alleges that he purchased a PPA-containing product at Fred's, Inc. d/b/a Fred's Discount Pharmacy ("Fred's"). Although Mr. Terry alleges that Fred's is a Mississippi corporation, defendants have presented unrebutted evidence that shows that Fred's is incorporated in Tennessee, where it maintains its corporate offices and principal place of business. *See* Affidavit of Michael R. Hodge; *see also Morris v. Princess Cruises, Inc.*, 236 F.3d 1061, 1067-68 (9th Cir. 2001) (noting that the court may consider "summary judgment-type evidence" to determine if joinder was fraudulent); 28 U.S.C. § 1332(c)(1).

Accordingly, the Court finds that plaintiffs Donald, Gilchrist, Oakley, and Terry have not brought claims against any non-diverse defendants.[1]

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[1] Plaintiffs have alleged that regardless of the citizenship of their defendants, complete diversity does not exist because they have brought their claims with other plaintiffs who have sued non-diverse defendants. This argument, however, is moot because the parties have since filed individual severed complaints by order of this Court.

Furthermore, the Court previously struck all pending motions to remand to state court and urged counsel to consider whether to re-file such motions, given the Court's denial of similar motions to remand in other cases. None of the plaintiffs listed in Appendix A to this order have presented the Court with a reason to depart from its prior rulings, and none of them have asserted valid claims against any in-state defendants.[2] A further explication of the Court's reasoning can be found in the Court's prior rulings denying similar motions to remand to state court, including *Pollard v. Bayer Corp., et al., Vick v. Novartis Corp., et al.*, and *Douglas v. Bayer Corp., et al.*

II. CONCLUSION

The Court finds that plaintiffs Donald, Gilchrist, Oakley, and Terry have not brought claims against any non-diverse defendants. The Court further concludes that the remaining plaintiffs listed in Appendix A have failed to state a cause of action against the retail defendants, and that the failure is obvious according to the settled rules of Mississippi and Louisiana. As such, the Court finds that the retail defendants were fraudulently joined and complete diversity exists among the parties. The Court therefore DENIES plaintiffs' motions to remand the cases to the state courts.

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[2] Plaintiff Watts alleges that in addition to a Mississippi retail defendant, he has sued a second non-diverse entity, Health Management Associates, Inc. d/b/a Madison County Medical Center ("MCMC"). In his operative complaint, however, Watts identifies MCMC as a Michigan corporation with its principal place of business in Florida, and despite defendants' claim of fraudulent joinder, plaintiff has not provided this Court with any evidence that MCMC is a non-diverse defendant.

DATED at Seattle, Washington this 5th day of May, 2004.

s/ Barbara Jacobs Rothstein

BARBARA JACOBS ROTHSTEIN
UNITED STATES DISTRICT JUDGE

APPENDIX A

MDL Docket Number	Plaintiff's Name
03-3032	Jessica Acevedo
04-22	James Anderson, et al
03-3459	Ira Banks
03-2732	Lessie Brown
03-2737	Renee Butler
03-2708	George and Donna Campbell
04-20	James Chasey
03-3034	Mark Chatman
03-3419	Essie Clark
03-3753	Oliver Clay
03-3522	Rose Cooper
03-2739	Emma Davis
03-3204	Kenneth Davis
03-3752	Barbara Donald
03-2734	Lucille Fells
03-2796	Sherry Gaines
03-2743	Will Gaines
03-2723	Charlotta Gardner
03-3754	Argie Gilchrist
03-2736	Mary Good
03-3206	Patricia Green aka Patricia Greene
03-2794	Samuel Hawkins
03-2797	Cherrice Jamison
03-3033	Lee Johnson
03-2738	Mae Ruth and Joseph Landers

03-2795	Byron Mabry
03-3028	Ed Magee
03-2746	Marie Moore
03-3418	George Oakley
04-16	Louise Overstreet
03-3205	Ralph Roby
04-64	Ralph Scott
04-65	Serena Scott
03-2735	Lucian and Edna Smith
03-3460	Sharon Smith
03-3417	James Terry
03-3755	Nathan Townsend
03-2745	Sara Watson Truitt
03-2740	Marilyn Walker
03-3036	Tamara Wallace
03-2844	Anderson Washington
03-539	Rudy Watts

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 04-35875
D.C. No. MD-01-01407-BJR

[Filed April 20, 2006]

In re: PHENYLPROPANOLAMINE (PPA) PRODUCTS LIABILITY LITIGATION	)
JAMES E. ANDERSON; et al.,	)
Plaintiffs - Appellants,	)
v.	)
BAYER CORPORATION; et al.,	)
Defendants - Appellees.	)

ORDER

Before: D.W. NELSON, RYMER, and FISHER, Circuit Judges.

The panel has voted to deny the petition for rehearing. Judges Rymer and Fisher have voted to deny the petition for rehearing en banc and Judge D. W. Nelson so recommends.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and petition for rehearing en banc are DENIED.

/s/_____

APPENDIX E

28 U.S.C. § 1332
§ 1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $ 75,000, exclusive of interest and costs, and is between–

(1) Citizens of different States;

(c) For the purposes of this section and section 1441 of this title–

(1) a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business; and

28 U.S.C. § 1441
§ 1441. Actions removable generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original

jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

28 U.S.C. § 1446
§ 1446. Procedure for removal

(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.

(b) The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial

pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.

(d) Promptly after the filing of such notice of removal of a civil action the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the notice with the clerk of such State court, which shall effect removal and the State court shall proceed no further unless and until the case is remanded.

28 U.S.C. § 1447
§ 1447. Procedure after removal generally

(c) A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

No. 5:03cv188BRS

[Filed March 20, 2003]

JAMES E. ANDERSON, JAMES ANDERSON, JOHN R. ANDERSON, JACK ARCHER, DOROTHY BAILEY, LOUIS BAILEY and BARBARA BAILEY, SHEILA BARKLEY, KATHY BRADHAM, EDDIE BUTLER, ETHEL CARTER, ERNESTINE DALE and M.J. DALE, ELIZABETH ELMORE, EMMA GOOCH, DAISY HARRIS, LEEIDA HENARD, ROBERT HENDRY, DOLLAS JACOB and EUGENE JACOB, OLLIE KING, MERLEAN MAGEE, WILLIAM C. MAGEE and ROSIE MAGEE, BELAIN MERRICK, GLENN MAIER and PAULA MAIER, SHARON TWYNER MCKINNEY, VALERIE MITCHELL, MELANIE NETTERVILLE and CHALRES NETTERVILLE, VERONICA NICKELSON, ELIZABETH PRITCHARD, EDWARD SCHUETTE, LEVI SMITH, SR. And MARJORIE SMITH, WILLIE THOMPSON, and MAY THOMPSON, BRENDA TROTT, ALFANETTE VAUGHN, DELLA WARREN, LOIS WASHINGTON, SHAWANDA WASHINGTON, CHARLES WELCH, PATRICIA WELLS, MARTHA WICKS, NATHANIEL	)

WILLIAMS and BOBBIE WILLIAMS, ROGER DALE WILSON and WILMA DIANE WILSON, DELORES WOODS, ROBERT GREEN, ILA ANN PACE, JOY PICKERING and JUDD PICKERING, GWENDOLYN SIMPSON, JAMES LAND AND MILDRED MARSHALL)

PLAINTIFFS)

vs.)

BAYER CORPORATION, A SUBSIDIARY OF BAYER A.G., SMITHKLINE BEECHAM CORP,; A SUBSIDIARY OF SMITHKLINE BECHAM HOLDINGS CORP.; GLAXOSMITHKLINE, INC.; GLAXOSMITHKLINE LLC; GLAXOSMITHKLINE CONSUMER HEALTHCARE LLP; GLAXOSMITHKLINE CONSUMER HEALTHCARE; BRISTOL-MYERS SQUIBB COMPANY; WYETH f/k/a AMERICAN HOME PRODUCTS CORP; BLOCK DRUG COMPANY, INC.; BLOCK DRUG CORPORATION; WAL-MART STORES, INC; WAL-MART STORES EAST, LP; WAL-MART STORES EAST, INC.; MCNEIL CONSUMER HEALTHCARE CO., a/k/a MCNEIL CONSUMER PRODUCTS CO., A SUBSIDIARY OF JOHNSON & JOHNSON CONSUMER COMPANIES, INC.; PROCTER AND GAMBLE PHARMACEUTICALS, INC; A SUBSIDIARY OF THE PROCTER AND GAMBLE COMPANY, INC.; THE PROCTER AND GAMBLE COMPANY; WELPHARM INC; ELAN PHARMACEUTICALS, INC.; AMERISOURCE BERGAN F/K/A AMERISOURCE HEALTH SERVICES D/B/A AMERICAN HEALTH)

PACKAGING AH; K & B SERVICES INC; SUPERMARKET OPERATIONS INC., D/B/A NATCHEZ MARKET; FRED'S OF TENNESSEE, INC.; A SUBSIDIARY OF FRED'S INC. A/k/a FRED'S, FRED'S EXPRESS, FRED'S DISCOUNT AND FRED'S PHARMACY; FRED'S OF NATCHEZ, INC.; D/B/A FRED'S JOHN DOE d/b/a COUNTY MARKET; JOHN DOE d/b/a DOWN'S VIDEO; KMART OF MICHIGAN, INC.; A SUBSIDIARY OF KMART CORP.; BRELAND DRUG COMPANY, INC. D/b/a BRUMFIELD'S DRUG STORE; LIBERTY DRUG STORE,; INC., STEPHEN L. LAFRANCE PHARMACY, INC., D/b/a SUPER D DRUGS; RITE-AID HEADQUARTERS CORP, RITE-AID PHARMACIES; WALCO OIL COMPANY, INC., d/b/a WALCO MART; JOHN DOE #1 AND JOHN DOE #2

DEFENDANTS

NOTICE OF REMOVAL

IN ACCORDANCE WITH 28 U.S.C. §§ 1441 & 1446, you are hereby notified that Defendant Bayer Corporation has removed this civil action from the Circuit Court of Wilkinson County, Mississippi, to the United States District Court for the Southern District of Mississippi, Western Division, and in support thereof would show unto the Court the following:

I.

This action was originally filed in the Circuit Court of Wilkinson County, Mississippi, as Civil Action No.02-0187.

II.

The United States District Court for the Southern District of Mississippi, Western Division, had, at the time the suit was filed, and now has, original subject matter jurisdiction of this civil action because there is complete diversity of citizenship among all properly joined parties, pursuant to 28 U.S.C. § 1332. The Complaint was filed by James E. Anderson, James Anderson, John R. Anderson, Jack Archer, Dorothy Bailey, Louisa Bailey and Barbara Bailey, Sheila Barkely, Kathy Bradham, Eddie Butler, Ethel Carter, Ernestine Dale and M.J. Dale, Elizabeth Elmore, Emma Gooch, Daisy Harris, Leeida Henard, Robert Hendry, Dollas Jacob, and Eugene Jacob, Ollie L. King, Merlean Magee, William C. Magee and Rosie Magee, Belain Merrick, Glenn Maier and Paula Maier, Sharon Twyner McKinney, Valerie Mitchell, Melanie Netterville and Charles Netterville, Veronica Nickelson, Elizabeth Pritchard, Edward Scheutte, Levi Smith, Sr. And Marjorie Smith, Willie Thompson and May Thompson, Brenda Trott, Alfanette Vaughn, Della Warren, Lois Washington, Shawanda Washington, Charles Welch, Patricia Wells, Martha Wicks, Nathaniel Williams and Bobbie Williams, Roger Dale Wilson and Wilma Diane Wilson, Delores Woods, Robert Green, Lil Ann Pace, Joy Pickering, and Judd Pickering, Gwendolyn Simpson, James Lang, and Mildred Marshall against defendants Bayer Corporation a subsidiary of Bayer A.G., SmithKline Beecham Corp., a subsidiary of SmithKline Beecham Holdings Corp., GlaxoSmithKline Inc., GlaxoSmithKline LLC., GlaxoSmithKline Consumer Healthcare LLP.,

GlaxoSmithKlline Consumer Healthcare, Bristol-Myers Squibb Company, Wyeth f/k/a American Home Products Corp., Block Drug Company, Inc., Block Drug Corporation, Wal-Mart Stores, Inc., Wal-Mart Stores East, LP., Wal-Mart Stores East, Inc., McNeil Consumer HealthCare Co., a/k/a McNeil Consumer Products Co., A subsidiary of Johnson & Johnson Consumer Companies, Inc., Proctor and Gamble Pharmaceuticals, Inc., a subsidiary of The Procter and Gamble Company, Inc., The Proctor and Gamble Company, Welpharm Inc., Elan Pharmaceuticals, Inc., Amerisource Bergan f/k/a Amerisource HealthServices d/b/a American Health Packaging AH., K & B Services, inc., Supermarket Operations, Inc., d/b/a Natchez Market, Fred's of Tennessee, Inc., a subsidiary of Fred's Inc., a/k/a Fred's, Fred's Xpress, Fred's Discount and Fred's Pharmacy, Fred's of Natchez, Inc., d/b/a Fred's John Doe d/b/a County Market, John Doe d/b/a Down's Video. Kmart of Michigan, Inc., a subsidiary of Kmart Corporation, Breland Drug Company, Inc., Brumfield's Drug Store, Liberty Drug Store, Inc., Stephen L. LaFrance Pharmacy, Inc., d/b/a Super D Drugs, Rite-Aid Headquarters Corp., d/b/a Rite-Aid Pharmacies, Walco Oil Company, Inc. D/b/a Walco. The amount in controversy in this civil action, exclusive of interest and costs, exceeds the sum of $75,000, as set forth in Plaintiffs' Complaint at paragraph 77. No party properly joined as a defendant is a citizen of the State of Mississippi, the state in which this action was brought. This action may be removed to this Court pursuant to 28 U.S.C. § 1441.

III.

According to the allegations of the Complaint, the following plaintiffs are all Mississippi resident citizens: James E. Anderson, James Anderson, John R. Anderson, Jack Archer, Dorothy Bailey, Louisa Bailey and Barbara

Bailey, Sheila Barkely, Kathy Bradham, Eddie Butler, Ethel Carter, Ernestine Dale and M.J. Dale, Elizabeth Elmore, Emma Gooch, Daisy Harris, Leeida Henard, Robert Hendry, Dollas Jacob, and Eugene Jacob, Ollie L. King, Merlean Magee, William C. Magee and Rosie Magee, Belain Merrick, Glenn Maier and Paula Maier, Sharon Twyner McKinney, Valerie Mitchell, Melanie Netterville and Charles Netterville, Veronica Nickelson, Elizabeth Pritchard, Edward Scheutte, Levi Smith, Sr. and Marjorie Smith, Willie Thompson and May Thompson, Brenda Trott, Alfanette Vaughn, Della Warren, Lois Washington, Shawanda Washington, Charles Welch, Patricia Wells, Martha Wicks, Nathaniel Williams and Bobbie Williams, Roger Dale Wilson and Wilma Diane Wilson, Delores Woods, Robert Green, Lil Ann Pace, Joy Pickering, and Judd Pickering, Gwendolyn Simpson, James Lang, and Mildred Marshall. Defendant Bayer Corporation is now and was at the time of filing a corporation organized under the laws of Indiana with its principal place of business in Pennsylvania. Defendant SmithKline Beecham Corp., a subsidiary of SmithKline Beecham Holdings, Corp., is now, and was at the time of filing, a corporation organized under the laws of the State of Pennsylvania with its principal place of business in Pennsylvania, and therefore is a citizen of Pennsylvania. Defendant GlaxoSmithKline, Inc. is an unknown entity and upon information and belief there is no such entity as GlaxoSmithKline, Inc. Defendant GlaxoSmithKline, LLC is an unknown entity and upon information and belief there is no such entity as GlaxoSmithKline, LLC. Defendant GlaxoSmithKline Consumer Healthcare, LP (also erroneously named herein as GlaxoSmithKline Consumer Healthcare) is now and was at the time of filing a Delaware limited partnership with its principal place of business in Pennsylvania and is a citizen of Delaware, New Jersey and Pennsylvania for federal jurisdiction purposes. Bristol-Myers

Squibb Company is now, and was at the time of filing, a corporation organized under the laws of the State of Delaware with its principal place of business in New York, and therefore is a citizen of Delaware and New York. Wyeth f/k/a American Home Products Corp., is now and was at the time of filing a corporation organized under the laws of Delaware with its principal place of business in New Jersey and therefore is a citizen of Delaware and New Jersey. Defendant Wyeth Ayerst is now and was at the time of filing a corporation organized under the laws of Delaware with its principal place of business in New Jersey and therefore is a citizen of Delaware and New Jersey. Defendant Block Drug Company, Inc. is now and was at the time of filing a corporation organized under the laws of New Jersey with its principal place of business in New Jersey. Defendant Block Drug Corporation is now and was at the time of filing a corporation organized under the laws of New Jersey with its principal place of business in New Jersey. Defendant Wal-Mart Stores, Inc. is now and was at the time of filing a corporation organized under the laws of Delaware with its principal place of business in Arkansas. Defendant Wal-Mart Stores East, LP. is now and was at the time of filing a limited partnership organized under the laws of Delaware with its principal place of business in Arkansas. Defendant Wal-Mart Stores East, Inc. is now and was at the time of filing a corporation organized under the laws of Arkansas with its principal place of business in Arkansas. McNeil Consumer Healthcare Co., a/k/a McNeil Consumer Products Co., a subsidiary of Johnson & Johnson Consumer Companies, Inc., upon information and belief and according to the complaint is now and was at the time of filing a corporation organized under the laws of New Jersey with its principal place of business in Pennsylvania. Defendant Procter and Gamble Pharmaceuticals, Inc., a subsidiary of Procter and Gamble Company, Inc., is now and was at the

time of filing a corporation organized under the laws of Ohio with its principal place of business in Ohio. Defendant Welpharm Inc., upon information and belief is now and was at the time of filing a corporation organized under the laws of California with its principal place of business in California. Defendant Elan Pharmaceuticals Inc., is now and was at the time of filing a corporation organized under the laws of Delaware with its principal place of business in California. Defendant Amerisource Bergan f/k/a Amerisource HealthServices d/b/a American Health Packaging AH, upon information and belief is now and was at the time of filing a corporation organized under the laws of Ohio with it s principal place of business in Ohio. Defendant K&B Services, Inc is now and was at the time of filing a corporation organized under the laws of Louisiana with its principal place of business in Louisiana. Defendant Fred's Stores of Tennessee, Inc.(erroneously sued as Fred's of Tennessee, Inc., a subsidiary of Fred's Inc. a/k/a Fred's, Fred's Xpress, Fred's Discount and Fred's Pharmacy) is now and was at the time of filing a corporation organized under the laws of Tennessee with its principal place of business in Tennessee. Defendant Fred's of Natchez, Inc. d/b/a Fred's is an unknown entity and upon information and belief there is no such entity as Fred's of Natchez, Inc. Defendant Stephen L. LaFrance Pharmacy, Inc. d/b/a Super D Drugs is now and was at the time of filing a corporation organized under the laws of Arkansas with its principal place of business in Arkansas. Defendant Kmart of Michigan, Inc. is now and was at the time of filing a corporation organized under the laws of Michigan with its principal place of business in Michigan, however it is in bankruptcy having filed its petition January 22, 2002, in the Bankruptcy Court for the Northern District of Illinois. Defendant Supermarket Operations, Inc., d/b/a Natchez Market is now and was at the time of filing a corporation organized under the laws of

Louisiana with its principal place of business in Mississippi and therefore is a resident citizen of Louisiana and Mississippi, but it has been fraudulently joined. Defendant John Doe d/b/a Down's Video is an unknown entity, but if it is a Mississippi resident citizen it has been fraudulently joined. Defendant Breland Drug Company, Inc. d/b/a Brumfield's Drug Store is now and was at the time of filing a corporation organized under the laws of Mississippi with its principal place of business in Mississippi, but it has been fraudulently joined. Defendant Liberty Drug Store, Inc. is now and was at the time of filing a corporation organized under the laws of Mississippi with its principal place of business in Mississippi, but it has been fraudulently joined. Defendant Walco Oil Company, Inc. d/b/a Walco Mart is now and was at the time of filing a corporation organized under the laws of Mississippi with its principal place of business in Mississippi, but it has been fraudulently joined. Plaintiffs have also named two "John Doe" defendants however, for purposes of removal their citizenship is disregarded. Defendants Supermarket Operations Inc., Breland Drug Company, Inc., Liberty Drug Store, Inc., and Walco Oil Company, Inc. are hereinater collectively referred to as the "Mississippi Retailer Defendants." There is complete diversity of citizenship between all properly joined plaintiffs and all properly joined defendants.

IV.

The plaintiffs have fraudulently joined the Mississippi Retailer Defendants because as to them the Complaint fails to state a claim upon which relief can be granted and with respect to which plaintiffs have a possibility of recovery, for the following reasons:

(a) The Complaint does not allege facts constituting any cause of action against the Mississippi Retailer Defendants. Under the alleged facts, the Mississippi Retailer Defendants had no duty to warn plaintiffs regarding the subject medicines which contained PPA, and no liability otherwise. Plaintiffs fail to state a claim against the Mississippi Retailer Defendants under any count and under the allegations there is no reasonable basis to predict that the plaintiffs can establish, that the Mississippi Retailer Defendants had or should have had knowledge of the alleged dangers of the subject medicines which contained PPA.

(b) Plaintiffs cannot recover from the Mississippi Retailer Defendants on a breach of warranty theory because plaintiffs gave no notice to the Mississippi Retailer Defendants of any breach before the institution of this suit.

(c) To the extent the Complaint purports to assert a claim of fraud against the Mississippi Retailer Defendants the Complaint does not comply with Mississippi and Federal Rules of Civil Procedure requiring averments of fraud to be stated with particularity and accordingly fails to state a claim for fraud upon which relief may be granted. Miss. R. Civ. P. 9(b); Fed. R. Civ. P. 9(b).

(d) Bayer refers to the opinion and orders denying remand, filed November 27, 2002, in *Barnett, et al. v. American Home Products Corp., et al.*, No. C02-423R, In Re: Phenylpropanolamine (PPA) Products Liability Litigation (MDL No. 1407), U.S. Dist. Ct. for the W. D. Wash., and in eight other cases transferred from federal courts in Mississippi to MDL No. 1407.

(e) Plaintiffs failed to allege a date of exposure or injury. To the extent plaintiffs' claims are barred by the applicable

statute of limitations, plaintiffs have no possibility of recovery against the Mississippi Retailer Defendants.

(f) K-Mart of Michigan Inc. filed a petition in bankruptcy on January 22, 2002 and therefore has also been fraudulently or improperly joined as a defendant in this action in violation of the automatic stay for the sole purpose or with the effect of defeating removal of this action to the United States District for the Southern District of Mississippi. Plaintiffs' attempt to join K-Mart in this action is invalid and in violation of the automatic stay. *See* 11 U.S.C. § 362.

Accordingly, there is no reasonable basis to predict that the plaintiffs might establish liability against the Mississippi Retailer Defendants and they are fraudulently joined.[1]

V.

Plaintiffs have attempted to defeat the diversity jurisdiction of this Court through improper joinder of parties. The plaintiffs are improperly joined and have fraudulently and improperly joined the non-diverse defendants. One or more plaintiffs allege no factual connection with a non-diverse defendant and have no claim against a non-diverse defendant, yet all plaintiffs purport to assert claims and seek

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[1] Alternatively, to the extent that the diverse defendants may be found to be non-diverse, it is also asserted that the diverse retailer defendants have been fraudulently joined for the same reasons set forth in paragraph IV. The diverse retailer defendants are Wal-Mart Stores, Inc., Wal-Mart Stores East, LP, Wal-Mart Stores East, Inc., K & B Services, Inc., Fred's Stores of Tennessee, Inc., Kmart of Michigan, Inc., Stephen L. LaFrance Pharmacy, Inc., and Rite-Aid Headquarters Corp.

recovery from all defendants in order to attempt to destroy diversity jurisdiction. Even if one or more plaintiffs has a claim against a non-diverse defendant, which is denied, such plaintiff(s) are improperly joined with plaintiff(s) who have claims only against diverse defendants. The plaintiffs' claims do not arise out of the same transaction or occurrence and there is no common question of law or fact.

VI.

This Notice of Removal is filed prior to thirty days after the first receipt through service by any defendant of a copy of the initial pleading setting forth the claim for relief upon which this action is based.

VII.

All defendants required to consent to removal have consented to this removal. Said consents are either attached hereto as Exhibit "C" are filed separately with the Clerk.

VIII.

Pursuant to 28 U.S.C. § 1446(a), a copy of all process, pleadings and orders received by this removing defendant is attached hereto as Exhibit "A."

IX.

On August 28, 2001, the Judicial Panel on Multi-District Litigation ("the Panel") issued an Order establishing an MDL in the United States District Court for the Western District of Washington for all PPA lawsuits pending in the federal courts. A copy of the Order is attached hereto as Exhibit "B." Defendant Bayer intends to notify the Panel that

this action is a "tag-along" case that should be transferred to the MDL proceeding.

RESPECTFULLY SUBMITTED this 20th day of March, 2003.

BAYER CORPORATION
By Its Attorneys
WATKINS & EAGER, PLLC

By: /s/
C. Joyce Hall

OF COUNSEL:

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(4)

No. 06-88

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In the
Supreme Court of the United States

BAYER CORPORATION, and WYETH,
Petitioners,

v.

JAMES E. ANDERSON, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING

The parties to the proceeding in this Court are as follows:

Bayer Corporation and Wyeth, *Petitioners*

James E. Anderson, James Anderson, Jr., John R. Anderson, Jack Archer, Dorothy Bailey Banks, Louis Bailey and Barbara Bailey, Sheila Barkley, Kathy Bradham, Eddie Butler, Ethel Carter, Ernestine Dale and M.J. Dale, Elizabeth Elmore, Daisy Harris, Leeida Henard, Robert Hendry, Dollas Jacob and Eugene Jacob, Ollie L. King, William C. Magee and Rosie Magee, Belain Merrick, Glenn Maier and Paula Maier, Sharon Twyner McKinney, Valerie Mitchell, Melanie Netterville and Charles Netterville, Veronica Nickelson, Elizabeth Pritchard, Edward Schuette, Levi Smith, Sr. and Marjorie Smith, Willie Thompson and Mae Thompson, Alfanette Vaughn, Della Warren, Lois Washington, Shawanda Washington, Charles Welch, Patricia Wells, Martha Wicks, Nathaniel Williams and Bobbie Williams, Roger Dale Wilson and Wilma Diane Wilson, Delores Woods, Robert Green, Lillian Pace, Joy Pickering and Judd Pickering, James Lang and Mildred Marshall, *Respondents*

The parties to the proceeding in the court whose judgment is sought to be reviewed are as follows:

Bayer Corporation, Wyeth, GlaxoSmithKline Consumer Healthcare, L.P., SmithKline Beecham Corporation d/b/a GlaxosmithKine, Block Drug Co., Inc., Block Drug Corporation, Bristol Myers Squibb, Proctor & Gamble Pharmaceuticals, Inc., Novartis Consumer Health, Inc, and Novartis Pharmaceuticals Corporation, McNeil-PPC, Inc., Wal-Mart Stores, Amerisource Bergan, Rite-Aid, Walco Oil, Super D Drugs Acquisition, Wal-Mart Stores East, Liberty Drug Store, and K & B Services, Inc., *Appellees*

All Respondents here are Appellants below.

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RESPONSE TO STATEMENT OF THE CASE

This case does not present the "important question" of which the defendants seek certiorari. Pet. for Cert. at 2. In an unpublished memorandum decision, the Ninth Circuit held that the Defendants failed to prove that resident defendants were fraudulently joined, where the Defendants did not establish that the Anderson Plaintiffs' joint complaint "obviously fails to state a cause of action under Mississippi law against resident defendants." ***Anderson v. Bayer Corp.***, #04-35875, Unpub. Op at 2 (9th Cir. 2006) (Petition for Writ of Certiorari App. A). This Court should not grant certiorari to evaluate the product liability law of Mississippi. The Ninth Circuit declined to sever the claims of the Anderson Plaintiffs who named non-diverse defendants, stating "[n]o basis appears in the record or in our case law" for doing so. Pet. for Cert. App. A.

The Ninth Circuit's refusal to sever claims against non-diverse defendants is the basis of the core complaint in the Petition for Writ of Certiorari. Based on decisions from the Fifth and Eleventh Circuits, the Petitioners argue that severance is required because misjoinder of plaintiffs amounts to fraudulent joinder. But the Petitioners waived any misjoinder argument because they failed to raise it in the District Court. The Ninth Circuit did not address misjoinder, or the case law with which the Petitioners claim a conflict.

Since the Ninth Circuit did not issue a holding on misjoinder, this case could not and does not conflict with ***In re Benjamin Moore & Co.***, 318 F.3d 626 (5th Cir. 2002) or ***Tapscott v. MS Dealer Serv. Corp.***, 77 F.3d 1353 (11th Cir. 1996). Pet. for Cert. App. A. Rather, nothing in this unpublished memorandum decision would prevent the Ninth Circuit from, in a future case, severing misjoined plaintiffs from properly joined plaintiffs, where the misjoinder destroyed complete diversity – assuming of course that misjoinder was actually pled and proved.

The following briefly summarizes the procedural history relevant to the Petition for Writ of Certiorari. The Anderson Plaintiffs – 47 parties injured after taking cold medications containing PPA, joined by 11 spouses – filed this action on December 27, 2003, in a state court in Mississippi. All of the Anderson Plaintiffs are Mississippi residents. The Defendants include non-resident manufacturers and distributors of the medications containing Phenylpropanolamine ("PPA"), and both resident and non-resident retailers who sold the defective products to the Plaintiffs. Nine Anderson Plaintiffs brought claims against non-resident manufacturers and resident retailers.

The Defendants removed the case in March 2003, claiming fraudulent joinder of resident defendants and misjoinder of plaintiffs. Pet. for Cert., App. F at 46a & 48a. The Anderson Plaintiffs moved to remand, but before any ruling, the case was transferred to MDL 1407, ***In re Phenylpropanolamine (PPA) Products Liability Litigation***. The Anderson Plaintiffs renewed their motion to remand on February 13, 2004. In opposition, the Defendants argued that the resident defendants were fraudulently joined – they did not argue that plaintiffs were misjoined. The Defendants attached to their opposition their earlier response to the motion to remand filed in Mississippi District Court, which also argued only fraudulent joinder of resident defendants, not misjoinder of plaintiffs.

On May 5, 2004, the District Court denied remand on the ground that the Anderson Plaintiffs fraudulently joined resident defendants, where they "failed to state a cause of action against the [resident] defendants, and that the failure is obvious according to the settled rules of Mississippi and Louisiana." The District Court did not address misjoinder – as above – the Defendants had not raised it.

The District Court dismissed the Anderson Plaintiffs' claims with prejudice under a Court Management Order

("CMO") and the Anderson Plaintiffs appealed from the dismissal and challenged the District Court's diversity jurisdiction. The Anderson Plaintiffs argued that the District Court lacked jurisdiction because the complaint stated valid claims under Mississippi law against resident defendants, thereby destroying diversity. The Defendants maintained that resident defendants were fraudulently joined under Mississippi law, but the Ninth Circuit disagreed, holding that joinder was proper, and that the District Court thus lacked diversity jurisdiction. The Ninth Circuit noted that the defendants had failed to present any evidence that resident retailer defendants had no knowledge of the dangers of PPA (Pet. for Cert. App. A) as they could have done under Mississippi law.

The Defendants also argued that the resolution of the District Court's diversity jurisdiction affected only the Anderson Plaintiffs who raised claims against resident defendants. They claimed that the Plaintiffs who sued resident defendants were misjoined with Plaintiffs who sued only diverse defendants and that the Plaintiffs had failed to dispute a District Court order holding them misjoined. Pet. for Cert. at 5. The Defendants' Brief of Appellee did not specify the District Court order that allegedly held the Anderson Plaintiffs misjoined, and since the issue was not raised, the District court never issued such an order in the Anderson consolidated case.

The Petitioners now suggest that CMO 15 conclusively establishes the misjoinder of the Anderson Plaintiffs. Pet. for Cert. at 4-5. CMO 15 is an administrative order in which the District Court severed cases already in the MDL, and ordered all plaintiffs in multi-plaintiff claims pending in the MDL to file new individual Complaints. Of course, there was no specific ruling on the Anderson Complaint, as this case had not yet been transferred into the MDL when the District Court issued CMO 15.

In any event, the Anderson Plaintiffs replied that the Defendants could not argue misjoinder of plaintiffs because they neglected to raise the argument in the District Court. As discussed above, when the Defendants responded to the Anderson Plaintiffs' motion to remand, they did not raise misjoinder. Nor did they suggest – as they incorrectly claim here – that CMO 15 had already resolved that the Anderson Plaintiffs' claims were misjoined.

During oral argument, the Defendants were expressly asked whether they had raised misjoinder of plaintiffs "below." They referred only the Notice of Removal filed in District Court of Mississippi, which was not in the excerpts of record before the Ninth Circuit.

After the Ninth Circuit issued its decision, the Defendants moved to supplement the Excerpts of Record (see Ninth Cir. Rules 10-2 and 30-1) to add their Notice of Removal, and petitioned for rehearing *en banc*, based solely on the alleged misjoinder of plaintiffs. The sole source of their Complaint is the following single sentence in the Ninth Circuit's decision:

> No basis appears in the record or in our case law for severing the claims of the eight plaintiffs who have named non-diverse defendants.

Pet. for Cert. App. A. The Anderson Plaintiffs, permitted to respond only to the motion to supplement the ER, argued that the Notice of Removal – the only document in which the Defendants argued misjoinder of plaintiffs – is irrelevant because the Defendants did not raise misjoinder of plaintiffs in their response to the motion for remand, or in any other capacity to the District Court. The Ninth Circuit denied both the motion to supplement the ER and the petition for rehearing *en banc*.

REASONS FOR DENYING THE PETITION FOR CERTIORARI

A. The Court should deny the Petition for Writ of Certiorari because the Ninth Circuit did not address the issue of which the Petitioners seek review.

The Petition for Certiorari assumes that Anderson Plaintiffs were misjoined, and based on that incorrect assumption, claims that the Ninth Circuit erred in refusing to hold that the allegedly misjoined Plaintiffs were fraudulently joined. But the Ninth Circuit did not address misjoinder, and thus could not, and did not issue a holding on whether misjoinder amounts to fraudulent joinder. This Court should not grant certiorari over an issue that the Ninth Circuit did not decide. ***Taylor v. Freeland & Kronz***, 503 U.S. 638, 645-46, 112 S. Ct. 1644, 118 L. Ed. 2d 280 (1992) ("'ordinarily, this Court does not decide questions not raised or resolved in the lower court[s]'") (quoting ***Youakim v. Miller***, 425 U.S. 231, 234, 96 S. Ct. 1399, 47 L. Ed. 2d 701 (1976) (*per curiam*)).

The Ninth Circuit does not consider issues that have not been raised in the District Court. ***Harick v. Cal. Teachers Ass'n***, 326 F.3d 1042, 1052 (9th Cir.) *cert. denied sub nom.* ***Sheffield v. Aceves***, 540 U.S. 965, 124 S.Ct. 429, 157 L.Ed.2d. 309 (2003). There is no "split in the Circuits" (Pet. for Cert. at 10) on this point. Neither this Court, nor any of the Circuit courts consider issues raised for the first time on appeal. ***Taylor***, 503 U.S. at 645-46; ***Bustamante-Barrera v. Gonzales***, 447 F.3d 388, 392 n.10 (5th Cir. 2006); ***DaimlerChrysler Corp. Healthcare Benefits Plan v. Durden***, 448 F.3d 918, 922 (6th Cir. 2006); ***Tanner Adver. Group, L.L.C. v. Fayette County***, 451 F.3d 777, 787 (11th Cir. 2006); ***Olsen v. United States***, 414 F.3d 144, 154 (1st Cir. 2005); ***Ghebremedhin v. Ashcroft***, 392 F.3d 241, 243 (7th Cir. 2004); ***Taylor v. Southwestern Bell Tel. Co.***, 251 F.3d 735, 740 (8th Cir. 2001); ***Baker v. Dorfman***, 239 F.3d 415, 420 (2nd Cir. 2000); ***Muth v. United States***, 1 F.3d 246, 250

(4th Cir. 1993); ***Gardiner v. Virgin Island Water & Power Auth.***, 145 F.3d 635, 646-47 (3rd Cir. 1989); ***Burnette v. Dresser Indus. Inc.***, 849 F.2d 1277, 1282 (10th Cir. 1988); ***District of Columbia v. Air Florida, Inc.***, 750 F.2d 1077, 1085 (D.C. Cir. 1984).

The Defendants did not raise misjoinder in the District Court and therefore waived the issue. ***Harick***, 326 F.3d at 1052. The Ninth Circuit did not address misjoinder, or whether misjoinder amounts to fraudulent joinder. Pet. for Cert. App. A. As such, the question presented in the Petition for Certiorari is fatally flawed, where it incorrectly assumes that Plaintiffs were misjoined. Pet. for Cert. at i.

The question presented in the Petition for Certiorari is whether misjoinder can amount to fraudulent joinder, such that a party's citizenship should be disregarded to determine diversity jurisdiction. Pet. for Cert. at i. The Petitioners claim that the Ninth Circuit's decision is in conflict with ***Tapscott*** (*supra*), which held that sufficiently egregious misjoinder is fraudulent joinder. Pet. For Cert. at 6, 7. But a finding of misjoinder – in fact, "egregious" misjoinder – is a predicate to the application of ***Tapscott***. Since the Ninth Circuit did not hold that parties were misjoined (much less egregiously misjoined), it did not and could not issue a holding accepting or rejecting ***Tapscott***.

Further, the Petitioners neglect to mention that they did not as much as mention ***Tapscott*** in the Brief of Appellee. Rather, it was not until after the Ninth Circuit issued its decision, that they raised ***Tapscott*** for the first time in their petition for rehearing *en banc*.

The Ninth Circuit simply did not address the issue of which the Petitioners seek review. Thus, this case does not present the issue raised, and it is an inappropriate vehicle to address whether the fraudulent joinder doctrine should extend to misjoined plaintiffs. The Court should deny certiorari.

B. The Ninth Circuit's decision does not conflict with decisions from the Fifth and Eleventh Circuits.

As discussed above, the Ninth Circuit did not address the issues presented in the Petition for Certiorari and this Court should deny certiorari. Even assuming that a single sentence in the Ninth Circuit's decision impliedly holds that plaintiffs were misjoined, albeit not fraudulently, the decision is not at odds with ***Tapscott***. There is no "split in the Circuits" and the Court should deny certiorari. Pet. for Cert. at 10.

The Petitioners argue that the Ninth Circuit's decision "directly conflicts" (Pet. for Cert. at 7) with ***Tapscott*** (11th Cir.) and ***Benjamin Moore*** (5th Cir.), "creating a split in the Circuits." *Id.* at 10. The rule of law articulated in ***Tapscott*** is that misjoinder of plaintiffs can be so "egregious" that it is fraudulent and merits disregarding the citizenship of the party who destroys diversity. ***Tapscott***, 77 F.3d at 1360. The Eleventh Circuit subsequently distinguished ***Tapscott*** on the ground that it involved "two distinct classes that have 'no real connection' to each other," joined into one class action. ***Triggs v. John Crump Toyota***, 154 F.3d 1284, 1289 (11th Cir. 1998). Contrary to the Petitioners' claim, the Ninth Circuit's decision is not inconsistent with the Eleventh Circuit's decision in ***Tapscott*** – it is factually distinguishable from ***Tapscott*** – and consistent with ***Triggs***.

1. The Ninth Circuit's decision does not reject *Tapscott*.

Tapscott involved two different class actions – the "automobile class" and the "merchant class" – joined together in one case. 77 F.3d at 1355. In the second class action including the merchant class, the sole defendant, Lowe's, was clearly diverse as to the named plaintiffs. Lowe's removed the case, and the district court found misjoinder, severed the two classes, remanding the automobile class to state court but retaining jurisdiction as to the merchant class action.

The Eleventh Circuit held that "[m]isjoinder may be just as fraudulent as the joinder of a resident defendant against whom a plaintiff has no possibility of a cause of action." 77 F.3d at 1360. Although Tapscott had colorable claims against the resident defendants in the automobile class, the resident defendants in the automobile class had no real connection with events giving rise to the putative merchant class action. *Id.* Rather, the facts giving rise to the automobile class's claims were "wholly distinct" from the facts giving rise to the merchant class's claims. *Id.* Thus, while "mere misjoinder" is not fraudulent joinder such that the court can ignore the citizenship of a party, egregious misjoinder may amount to fraudulent joinder. *Id.*

Contrary to the Petitioners' claim, there is nothing in the Ninth Circuit's decision even suggesting that it disagrees with ***Tapscott***, much less that it "flatly rejected the [***Tapscott***] doctrine." Pet. for Cert. at 11. The Petitioners neglect to mention that the Ninth Circuit's decision does not cite, discuss, or even mention ***Tapscott***. *Id.* As discussed above, the Petitioners did not even raise ***Tapscott*** until after the Ninth Circuit issued its decision.

The only Ninth Circuit decision addressing ***Tapscott*** – or whether egregious misjoinder is fraudulent – is an unpublished decision that turns on the egregiousness requirement. ***Cal. Dump Truck Owners Ass'n v. Cummins Engine Co., Inc.***, 24 F. App'x. 727, 730 (9th Cir. 2001) (cited at Pet. For. Cert. at 11). There, "[f]or purposes of discussion," the Ninth Circuit "assume[d], without deciding," that it would adopt the ***Tapscott*** doctrine that egregious misjoinder amounts to fraudulent joinder. ***Cal. Truck***, 24 F. App'x. at 729. The Court held that joinder "was not so improper as to be considered egregious," where all plaintiffs, diverse and non-diverse, brought claims involving the same defective product from a defendant manufacturer. *Id.* at 730. Thus, ***Tapscott*** was inapplicable.

The Ninth Circuit easily could have reached a similar conclusion here. Assuming, as the Petitioners do, that Plaintiffs were misjoined, it is entirely possible that the Ninth Circuit concluded that misjoinder was not so egregious as to be fraudulent because all of the Anderson Plaintiffs' claims involved the same defective product – PPA – produced by a defendant manufacturer and sold be a defendant retailer. Such a holding would be wholly consistent with the Court's statement that neither the record nor the law supported severing the Plaintiffs whose claims destroyed diversity. Pet. for Cert. App. A.

2. The Ninth Circuit's decision is distinguishable from *Tapscott* on grounds very similar to those the Eleventh Circuit enunciated shortly after deciding *Tapscott*.

Two years after the *Tapscott* decision, the Eleventh Circuit distinguished *Tapscott* on the ground that it involved "two distinct classes that ha[d] 'no real connection' to each other." *Triggs v. John Crump Toyota*, at 1286. As *Triggs* makes clear, *Tapscott* is readily distinguishable from this case, which is not a class action and does not join separate classes of plaintiffs with claims based on different products. Rather this case involves a joint complaint, in which each plaintiff claims similar physical injuries resulting from the consumption of cold medications containing the same injury-causing drug: PPA.

As in *Triggs*, the Anderson Plaintiffs' claims arise out of similar transactions and raise "common questions of law and fact." 154 F.3d at 1290. Each Anderson Plaintiff claimed that they suffered similar physical injuries caused by ingesting PPA. Each Plaintiff alleged that they came in contact with PPA through over-the-counter cold medications. The Plaintiffs asserted claims against the manufacturers of the particular cold medications they consumed, and against the retailers from whom they purchased the medications. There

is a "real connection" between these claims, and ***Tapscott*** is inapplicable. *Id.*

3. The Fifth Circuit does not add to the "split" that the Petitioners allege.

Contrary to the Petitioners' claim, ***Benjamin Moore***, 318 F.3d at 630-31, does not add to the alleged split in the Circuits. Pet. for Cert. at 9. The Petitioners concede, as they must, that the Fifth Circuit did not actually apply ***Tapscott*** in ***Benjamin Moore***. *Id.* Rather, the Court expressly declined to apply ***Tapscott***, and clarified that it was not rejecting the ***Tapscott*** rationale (318 F.3d 630-31):

> Thus, without detracting from the force of the ***Tapscott*** principle that fraudulent misjoinder of plaintiffs is no more permissible than fraudulent misjoinder of defendants to circumvent diversity jurisdiction, we do not reach its application in this case.

At most, ***Benjamin Moore*** makes the Fifth Circuit the first and only Circuit to indicate agreement with ***Tapscott*** in a published opinion. Of course, this indicates consensus, not a split. The Petitioners suggest that the Ninth Circuit has also indicated agreement with ***Tapscott***, in the unpublished decision ***California Dump Truck***, discussed above. Pet. for Cert. at 11. So at most, two Circuits have expressed agreement with ***Tapscott***, and none have expressed disagreement. The Ninth Circuit opinion, which does not even address ***Tapscott***, misjoinder, or egregious misjoinder amounting to fraud, does nothing to upset the agreement in these decisions.

CONCLUSION

For the reasons stated above, the Anderson Plaintiffs respectfully ask the Court to deny the Petition for Certiorari.

Respectfully Submitted,

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In the Supreme Court of the United States

BAYER CORPORATION AND WYETH,
Petitioners,

v.

JAMES E. ANDERSON, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY TO STATEMENT OF THE CASE

Respondents raise three points that require reply: (1) The Ninth Circuit did not rule on misjoinder; (2) Petitioners did not raise improper joinder in the MDL Court; and (3) CMO 15 did not establish that the Anderson plaintiffs were misjoined. All three assertions are wrong.

First, the Ninth Circuit's refusal to sever the plaintiffs who named non-diverse defendants was a ruling on misjoinder. Petitioners argued, with citation of supporting case law,[1] that eight plaintiff-appellants who asserted claims against non-diverse defendants could not destroy diversity for the other 46 plaintiffs-appellants, because they were misjoined, and pointed out that the MDL Court's holding of misjoinder was not disputed.[2] Accordingly, Petitioners argued, the Ninth Circuit should affirm the MDL Court's

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[1] Respondents incorrectly claim that Petitioners did not raise the improper joinder issue in the Ninth Circuit because they did not cite *Tapscott v. MS Dealer Serv. Corp.*, 77 F.3d 1353 (11th Cir. 1996) in the Brief of Appellees. Petitioners expressly raised the issue in that brief and cited three cases approving or applying the fraudulent misjoinder doctrine, including *In re Benjamin Moore & Co.*, 318 F.3d 626, 630-31 (5th Cir. 2002), which recognized "the force of the *Tapscott* principle." Brief of Appellees at 16, 22.

[2] Respondents incorrectly claim that Petitioners did not identify the Order that held the Anderson plaintiffs misjoined. Petitioners specifically asserted that CMO 15 held plaintiffs in multi-plaintiff cases – including pending and future cases – misjoined under F.R.C.P. 20 and required filing of severed individual complaints; that CMO 15 applied to the Anderson plaintiffs, who did not object to its application; and that the Anderson plaintiffs did not challenge the MDL Court's conclusion that they were misjoined. Brief of Appellees at 4, 8-9, 14, 22.

denial of remand as to the 46 indisputably misjoined plaintiffs who asserted claims only against diverse defendants, regardless of whether it held the other eight plaintiff-appellants fraudulently joined non-diverse defendants.

The court of appeals held that the non-diverse defendants were not fraudulently joined. In addition, the court rejected Petitioners' improper joinder argument by refusing to sever the eight plaintiffs who named non-diverse defendants. The effect was that diversity was destroyed for all plaintiffs' claims, and the court ordered the entire case remanded to state court. That the court of appeals did not elaborate on its reasoning or address cases cited by Petitioners does not mean it did not rule on the improper joinder issue.

Contrary to Respondents' assertion, Petitioners do not seek review of the Ninth Circuit's holding that the non-diverse defendants were not fraudulently joined, nor do they ask this Court to grant certiorari "to evaluate the product liability law of Mississippi," Brief in Opposition at 1, as Respondents contend. They seek review of the court of appeals' improper joinder holding.

Second, Petitioners raised improper joinder in the MDL Court, did not waive it, and the issue was squarely before the court on the motion to remand. As Respondents admit, Petitioners invoked the jurisdiction of the federal court by asserting diversity based on improper joinder, in addition to fraudulent joinder, in the Notice of Removal. The motion to remand raised the question whether the MDL Court had diversity jurisdiction as alleged in the Notice of Removal. Expressly responding to Petitioners' assertion of improper joinder in the Notice of Removal, Respondents in the motion to remand referred to *Tapscott* and moved, alternatively, for severance and remand of plaintiffs who named non-diverse

defendants. Given the Respondents' motion for severance, and given that the MDL Court previously had found non-diverse defendants fraudulently joined in ten similar actions, Petitioners did not request severance but sought denial of remand because the non-diverse defendants were fraudulently joined.

Third, CMO 15 applied to the Anderson plaintiffs and established that they were misjoined. In CMO 15, the MDL Court held that all plaintiffs in multi-plaintiff cases were misjoined under F.R.C.P. 20 and required each to file an individual severed complaint. The Order expressly applied to pending and future docketed cases. Thus, when the Anderson case was docketed, CMO 15's holding of improper joinder applied to it, and Anderson became subject to CMO 15's severance requirement. At no time after Anderson was docketed did the Anderson plaintiffs object to CMO 15 or its application to them. Rather, they filed individual severed complaints, pursuant to CMO 15, but did so tardily, resulting in their dismissal.

REPLY TO REASONS FOR DENYING THE PETITION

A. Reply to Argument that Ninth Circuit Did Not Address Misjoinder Issue.

Respondents raise the new point that the Ninth Circuit did not hold the Anderson plaintiffs improperly joined, and therefore it could not possibly have ruled on whether improper joinder can defeat diversity. Since the Ninth Circuit did not rule on the improper joinder issue, they argue, this Court should not grant certiorari to review it. This point is fundamentally flawed because it completely overlooks the court of appeals' severance ruling, which as explained above,

was a ruling on the improper joinder argument advanced by Petitioners.

Petitioners argued that plaintiffs who only claim against diverse defendants – and whose claims would be removable if filed separately – cannot defeat a defendant's right to remove by improperly joining other plaintiffs who claim against non-diverse defendants. The Ninth Circuit's refusal to sever the eight plaintiffs who named non-diverse defendants rejected this argument. While the court did not use the word "misjoinder," this does not mean it did not address the misjoinder issue.[3]

Respondents argue that the Ninth Circuit did not address Petitioners' improper joinder argument because Petitioners waived that argument by not raising it in the MDL Court. There is no hint of this in the Ninth Circuit's Opinion. To the contrary, the severance holding establishes that the Ninth Circuit did rule on Petitioners' improper joinder argument. Further, as explained above, Petitioners did not waive the issue, which was squarely before the MDL Court. *See Nelson v. Adams, USA, Inc.*, 529 U.S. 460, 469 (2000) (issue is preserved if lower court is "fairly put on notice as to the substance of the issue"); *In re E.R. Fegert, Inc.*, 887 F.2d 955, 957 (9th Cir. 1989) (argument may be considered on

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[3] Respondents are correct that, before a court can sever improperly joined plaintiffs, it must hold that they are improperly joined. The converse, however, is not true. A court can refuse to sever improperly joined plaintiffs, either by holding that the plaintiffs are improperly joined or by assuming without deciding that they are improperly joined, but holding that it will not sever. *See, e.g., Rabe v. Merck & Co., Inc.*, 2005 WL 2094741, at *2 (S.D. Ill. 2005) (rejecting fraudulent misjoinder doctrine without deciding whether plaintiffs were improperly joined).

appeal if it was "raised sufficiently for the trial court to rule on it" – whether the court ruled on it or not); *Harrell v. 20th Century Ins. Co.*, 934 F.2d 203, 205-06 n. 1 (9th Cir. 1991) (where party argued issue below and opposing party did not respond, opposing party was not precluded from arguing issue on appeal).

Respondents cannot write the severance holding out of the Ninth Circuit's Opinion. This Court should grant certiorari to consider this important question of federal jurisdictional law.

B. Reply to Argument that Ninth Circuit's Decision Does Not Conflict with Eleventh and Fifth Circuits' Decisions.

Respondents urge a narrow reading of the Eleventh Circuit's *Tapscott* decision and argue that the Ninth Circuit's decision is perfectly consistent with *Tapscott*. They claim that nothing in the Opinion suggests disagreement with *Tapscott*. Respondents again ignore the court's severance ruling in response to Petitioners' misjoinder argument. In rejecting severance, the remedy required by the improper joinder cases cited by Petitioners and by *Tapscott*, the Ninth Circuit rejected Petitioners' improper joinder argument and *Tapscott*.

The Ninth Circuit's decision directly conflicts with *Tapscott*. In *Tapscott*, the court held the misjoinder was so "egregious" it amounted to fraudulent joinder because there was "no real connection" between the automobile class non-diverse defendant and the merchant class controversy. 77 F.3d at 1360, *quoting Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92, 97 (1921). Similarly, in this action, there is no alleged connection between any non-diverse defendant and the controversies of 46 of the plaintiffs.

Respondents argue that this case is like *Triggs v. John Crump Toyota, Inc.*, 154 F.3d 1284 (11th Cir. 1998), where the Eleventh Circuit distinguished *Tapscott*. *Triggs*, however, involved a single class seeking joint liability of defendants in a fraudulent leasing scheme, where the court held the non-diverse defendant properly joined and looked only to the citizenship of named parties to determine diversity. This case, involving improperly joined plaintiffs, only a few of whom assert a claim against a non-diverse defendant, who has no connection with the rest of the plaintiffs, presents facts more similar to those in *Tapscott* and *In re Benjamin Moore* and conflicts with those decisions.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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BRIEF OF AMICUS CURIAE PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether 49 plaintiffs with claims solely against diverse defendants may improperly join with nine plaintiffs suing four non-diverse defendants for the sole purpose of defeating federal diversity jurisdiction.

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INTEREST OF AMICUS CURIAE

The Pharmaceutical Research and Manufacturers of America ("PhRMA") is a non-profit association that represents more than thirty of the country's leading pharmaceutical research and biotechnology companies.[1] Together, PhRMA members are responsible for researching and developing a huge portion of innovative medicines available to consumers. In 2005 alone PhRMA members invested a combined estimated total of $39.4 billion in discovering and developing new medicines, out of $51.3 billion industry-wide.

Product liability suits are a common fixture of the pharmaceutical industry and continue to balloon in volume. In confronting these suits, PhRMA members, like many mass tort defendants, depend upon the efficiency and procedural safeguards of the federal judicial system. They rely in particular on the federal multidistrict litigation provisions and removal statutes, 28 U.S.C. §§ 1407, 1441, which, taken together, allow PhRMA members to aggregate an otherwise overwhelming caseload and ensure a fair disposition in federal court.

In its cursory opinion rejecting the important procedural doctrine of "fraudulent misjoinder," the Ninth Circuit, perhaps unwittingly, cripples the right of PhRMA members to remove product liability actions to federal court by encouraging plaintiffs in unrelated

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[1] The parties have consented to the filing of this brief and their respective letters of consent have been lodged with the Clerk. In accordance with Supreme Court Rule 37.6, no party authored this brief in whole or in part and no person or entity other than PhRMA or its members contributed monetarily to its preparation or submission. A list of PhRMA members is available at www.phrma.org.

pharmaceutical actions to join together for the purpose of defeating federal diversity jurisdiction. As a result of the Ninth Circuit decision, PhRMA members will be forced to defend in state court thousands of cases that properly belong in federal court, including in multidistrict litigation proceedings, and the decision will therefore frustrate the salutary goals underlying the multidistrict consolidation statute.

STATEMENT

1. The number of mass tort suits against pharmaceutical companies has increased dramatically in recent years, *see, e.g.*, Federal Judicial Center, *Manual for Complex Litigation* § 22.1, at 344 (4th ed. 2004), and now accounts for a substantial percentage of all product liability actions filed nationwide, *see, e.g.*, Administrative Office of the Courts, *Judicial Facts and Figures* tbl.4.5 note (2005), *available at* http://www.uscourts.gov/judicialfactsfigures/Table405.pdf. Pharmaceutical mass tort cases also represent a significant percentage of the cases consolidated for pretrial proceedings by the Judicial Panel on Multidistrict Litigation ("MDL Panel" or "Panel"). *See* Administrative Office of the Courts, *Judicial Business of the United States Courts* 26 (2005), *available at* http://www.uscourts.gov/judbus2005/front/judicialbusiness.pdf ("large number" of the 8,874 cases transferred by the Panel during the 12-month period ending September 30, 2005, were "product liability cases involving the arthritis pain medication Vioxx and diet drugs"). Over the last five years, the Panel has ordered at least 17 different multidistrict litigations involving pharmaceutical drugs, including five in the first half of 2006 alone. Judicial Panel on Multidistrict Litigation, "Products Liability Litigations," *available at* http://www.jpml.uscourts.gov/Pending_MDLs/Products_Liability/products_liability.html.

Because of their size, scope, and monumental cost, pharmaceutical mass tort actions "strain the limits of the traditional adversary system," Advisory Committee on Civil Rules and Working Group on Mass Torts, *Report on Mass Tort Litigation* 4 (1999), *as reprinted without appendices in* 187 F.R.D. 293, 298 (1999), and "continue to plague the pharmaceutical industry," *see* Rochelle Chodock et al., *"Insuring" the Continued Solvency of Pharmaceutical Companies in the Face of Product Liability Class Actions*, 40 Tort Trial & Ins. Prac. L.J. 997, 997 (2005).

2. The huge volume of pharmaceutical and other mass tort actions and the resulting tax on judicial resources have created "enormous pressure to aggregate or combine [cases]." *Manual for Complex Litigation, supra*, § 22.1, at 346. The multidistrict litigation statute, 28 U.S.C. § 1407, has been a critically important aggregation tool in addressing the problem of mass torts, litigation that otherwise threatens to swamp the judicial system.[2] *See, e.g., In re "Agent Orange" Prod. Liab. Litig.*, 304 F. Supp. 2d 404, 416 (E.D.N.Y. 2004) (Weinstein, J.) ("Mass tort actions are especially suited to MDL treatment."); 15 Charles Alan Wright et al., *Federal*

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[2] This has been particularly true in recent years. From 1968, when the Panel was created, to September 30, 1995, a total of 92,555 actions were consolidated for pretrial proceedings under § 1407. Administrative Office of the Courts, *Judicial Business of the United States Courts* tbl.S-22 (1997), *available at* http://www.uscourts.gov/judicial_business/s22sep97.pdf. As of September 30, 2005, that number had reached 228,466. Administrative Office of the Courts, *Judicial Business of the United States Courts* tbl.S-20 (2005), *available at* http://www.uscourts.gov/judbus2005/tables/s20.pdf. Thus, the average annual number of consolidated actions in the Panel's first 27 years was under 3,500. Over the next 10 years, that number had increased by nearly four times, to more than 13,500.

Practice and Procedure: Jurisdiction 2d § 3868, at 499 (Supp. 2006) (MDLs have a "unique ability to deal effectively with the problem of mass torts.").

In the pharmaceutical context in particular, multidistrict litigation has been an essential case management tool: The most prominent pharmaceutical mass torts -- including those involving the Dalkon Shield (MDL No. 211), Benedictin (MDL No. 486), Fen-Phen (MDL No. 1203), Rezulin (MDL No. 1348), Propulsid (MDL No. 1355), Baycol (MDL No. 1431), Vioxx (MDL No. 1657), Bextra and Celebrex (MDL No. 1699), and PPA (MDL No. 1407), the drug involved in this case -- have all resulted in MDL treatment.

3. The MDL Panel is authorized to transfer only cases pending in federal district courts. *See* 28 U.S.C. § 1407(a). Consequently, the statutory right of defendants to remove cases from state to federal court under appropriate circumstances, *see* 28 U.S.C. § 1441(a), is an essential aspect of multidistrict litigation. When defendants are wrongfully deprived of their removal right, cases that would otherwise be transferred and consolidated under the auspices of a federal MDL are typically left unconsolidated and must remain in various state courts.

Manipulating the federal removal mechanism -- and thus the MDL consolidation process -- by fraudulently misjoining unrelated parties not only deprives defendants of a statutory right; it also exacerbates the problem of mass torts, leading to congestion of state court dockets, delay, and excess costs, and increasing the risk of inconsistent judicial rulings. *Compare Report on Mass Tort Litigation*, *supra*, at 28, *as reprinted in* 187 F.R.D. at 308 ("most fundamental" problem of mass torts is "sheer number of claims"), *with Manual for Complex Litigation*, *supra*, § 22.33, at 367 ("Centralization [under § 1407] serves judicial economy by avoiding duplication of discovery, preventing inconsistent or repetitive rulings,

and conserving the financial resources of the parties, their counsel, and the judiciary.").

To avoid federal jurisdiction and therefore escape MDL consolidation in the mass tort context, plaintiffs often engage in two related practices: forum shopping and fraudulent joinder.[3] It is well documented that mass tort plaintiffs often file suit in a particular state forum because the jurisdiction is perceived to have a pro-plaintiff bias. *See, e.g., Report on Mass Tort Litigation, supra,* at 33, *as reprinted in* 187 F.R.D. at 310 ("A basic pattern, familiar in general practice but more visible in mass torts, involves selection of a court that has proved beneficial to the party choosing the forum."); Barbara J. Rothstein et al., *A Model Mass Tort: The PPA Experience,* 54 Drake L. Rev. 621, 623-24 (2006) (noting that "plaintiffs' counsel attempt to litigate in [state] jurisdictions with favorable discovery rules, early trial dates, and juries that are receptive to such claims"). To remain in these ostensibly advantageous forums, these plaintiffs frequently "join marginal defendants to defeat federal diversity jurisdiction," *Report on Mass Tort Litigation, supra,* at 34, *as reprinted in* 187 F.R.D. at 310, or misjoin plaintiffs whose claims have no connection to their own, *see In re Prempro Prods. Liab. Litig.*, 417 F. Supp. 2d 1058, 1059 (E.D. Ark. 2006) (noting that in "multi-plaintiff and multi-defendant pleadings" the "non-diverse plaintiff is typically misjoined for the sole purpose of defeating diversity").

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[3] As used here, the phrase "fraudulent joinder" includes the concept of fraudulent misjoinder. *See* 14B Charles Alan Wright et al., *Federal Practice and Procedure: Jurisdiction 3d* § 3723, at 656 (1998) (viewing fraudulent misjoinder as "part of the doctrine of fraudulent joinder").

REASONS FOR GRANTING THE WRIT

I. The Ninth Circuit Decision Nullifies the Doctrine of Fraudulent Misjoinder

A. The fraudulent misjoinder doctrine has been recognized by two federal circuit courts, numerous district courts, and every scholar to have considered the doctrine in depth, as critical to safeguarding a defendant's statutory right to remove cases from state to federal court. Yet, the Ninth Circuit, with next to no analysis, has jettisoned it as a matter of law. *See* Pet. App. at 3a ("No basis appears in the record *or in our case law* for severing the claims of the eight plaintiffs who have named non-diverse defendants.") (emphasis added).

The Eleventh Circuit first articulated the fraudulent misjoinder doctrine in *Tapscott v. MS Dealer Service Corp.*, 77 F.3d 1353 (11th Cir. 1996). In that case, the district court severed two putative class actions joined in a single amended complaint, and remanded only the component that involved indisputably non-diverse parties. The Eleventh Circuit affirmed, holding that misjoinder of non-diverse plaintiffs under Federal Rule of Civil Procedure 20 "may be just as fraudulent as the joinder of a resident defendant against whom a plaintiff has no possibility of a cause of action," *id.* at 1360, as both have the effect of improperly preventing removal to federal court.

The Fifth Circuit has similarly embraced the fraudulent misjoinder doctrine. *See In re Benjamin Moore & Co.*, 318 F.3d 626, 630-31 (5th Cir. 2002) (recognizing "force of the *Tapscott* principle that fraudulent misjoinder of plaintiffs is no more permissible than fraudulent misjoinder of defendants to circumvent diversity jurisdiction"). Prior to the Ninth Circuit decision in this case, not one federal appeals court had rejected it. *Cf. Calif. Dump Truck Owners Ass'n v. Cummins Engine Co.*, 24 Fed. Appx. 727, 729 (9th Cir. 2001) (assuming without

deciding that Ninth Circuit would accept fraudulent misjoinder doctrine).

In addition, district courts in nearly every federal circuit have recognized the fraudulent misjoinder doctrine as a vital tool in preventing plaintiffs from improperly depriving defendants of their statutory removal right. These courts have relied upon the doctrine especially in the pharmaceutical context, where the practice of conniving to defeat federal diversity jurisdiction is widespread. *See In re Prempro*, 417 F. Supp. 2d at 1059-60; *Ashworth v. Albers Med., Inc.*, 395 F. Supp. 2d 395, 409-13 (S.D. W. Va. 2005); *Greene v. Wyeth*, 344 F. Supp. 2d 674, 683-85 (D. Nev. 2004); *Jones v. Nastech Pharmaceutical*, 319 F. Supp. 2d 720, 728 (S.D. Miss. 2004); *In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prods. Liab. Litig.*, 294 F. Supp. 2d 667, 677-79 (E.D. Pa. 2003); *In re Baycol Prods. Liab. Litig.*, MDL No. 1431, 2003 WL 22341303, at *3 (D. Minn. 2003); *In re Rezulin Prods. Liab. Litig.*, 168 F. Supp. 2d 136, 147-48 (S.D.N.Y. 2001).[4]

Orders requiring that each individual plaintiff file separate, non-aggregated complaints have become an essential aspect of the proper management of large-scale mass torts. These commonplace orders not only help to prevent the misjoinder of parties to manipulate diversity; they also require that individual plaintiffs specify the precise nature of their injury and the parties from whom they seek relief, as well as allow for the orderly consideration and docket administration of each

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[4] For cases outside the pharmaceutical context, see, for example, *Asher v. Minnesota Mining and Manufacturing Co.*, No. 04CV522KKC, 2005 WL 1593941, at *7 (E.D. Ky. June 30, 2005), *Coleman v. Conseco, Inc.*, 238 F. Supp. 2d 804, 817-19 (S.D. Miss. 2002), and *Rudder v. Kmart Corp.*, No. 97-0272-BH-S, 1997 WL 907916, at *5 (S.D. Ala. Oct. 15, 1997).

individual case. Judge Rothstein's Case Management Order No. 15 in this matter is but one of a large number of similar orders in a wide range of MDLs. *See, e.g., In re Prempro Prods. Liab. Litig.*, MDL No. 1507 (E.D. Ark. Aug. 31, 2004) (unnumbered pretrial order), *available at* http://ecf.ared.uscourts.gov; *In re Baycol Prods. Liab. Litig.*, MDL No. 1431 (D. Minn. Jan. 15, 2003) (pretrial order 61), *available at* http://www.mnd.uscourts.gov/Baycol_Mdl; *In re Diet Drugs*, 294 F. Supp. 2d at 679 (pretrial order 2946); *see also In re Orthopedic Bone Screw Prods. Liab. Litig.*, MDL No. 1014, 1995 WL 428683, at *7 (E.D. Pa. July 17, 1995) (pretrial order 72). The Ninth Circuit opinion would reduce the effectiveness of this crucial practice.

Two recent scholarly treatments of the fraudulent misjoinder doctrine -- and the only ones to have examined the doctrine in depth -- have likewise concluded that the doctrine is essential to the proper application of the federal diversity jurisdiction and removal statutes. *See* E. Farish Percy, *Defining the Contours of the Emerging Fraudulent Misjoinder Doctrine*, 29 Harv. J.L. & Pub. Pol'y 569, 571, 575 (2006) (describing doctrine as "necessary to protect a diverse defendant's statutory right to remove" and "a vital tool for defendants who desire to litigate in federal court"); Laura J. Hines & Steven S. Gensler, *Driving Misjoinder: The Improper Party Problem in Removal Jurisdiction*, 57 Ala. L. Rev. 779, 780 (2006) (describing doctrine as "vital tool" of federal courts for "polic[ing] joinder gamesmanship").

B. The implications of eliminating the fraudulent misjoinder doctrine are significant and far-reaching. First and foremost, the Ninth Circuit decision will exacerbate the problem of forum shopping in pharmaceutical mass tort actions and encourage plaintiffs' lawyers to misjoin unrelated parties for the sole purpose of defeating diversity jurisdiction.

Numerous courts have held that where, as here, the only common "transaction or occurrence" among plaintiffs is that they have ingested the same drug, joinder is improper.[5] In the underlying litigation in this case, Judge Rothstein, who has been noted for her skill in handling complex mass tort litigation, *see, e.g.*, Byron G. Stier, *Resolving the Class Action Crisis: Mass Tort Litigation as Network*, 2005 Utah L. Rev. 863, 921-31 (describing PPA MDL court as model of effective mass tort administration), recognized that ingesting a PPA-containing product was insufficient to satisfy Federal Rule of Civil Procedure 20. *See In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, MDL No. 1407 (W.D. Wash. May 29, 2003) (Case Management

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[5] *See In re Prempro*, 417 F. Supp. 2d at 1060 (finding misjoinder where the "only common thing" among plaintiffs is that they took a hormone replacement therapy drug); *In re Diet Drugs*, 294 F. Supp. 2d at 679 (finding misjoinder "where the only connection among plaintiffs is their use of certain pharmaceuticals"); *In re Baycol*, 2003 WL 22341303, at *4 (finding misjoinder where plaintiffs alleged "injuries suffered as a result of ingesting Baycol, without more"); *In re Rezulin Prods. Liab. Litig.*, MDL No. 1348, 2002 WL 548750, at *2 (S.D.N.Y. Apr. 12, 2002) ("[J]oinder of plaintiffs who have no connection to each other aside from the fact that they ingested Rezulin is misjoinder."); *Simmons v. Wyeth Labs., Inc.*, No. 96-CV-6631, 1996 WL 617492, at *4 (E.D. Pa. Oct. 24, 1996) (finding misjoinder where plaintiffs alleged that they "experienced one or more of numerous injuries and side effects" from using contraceptive Norplant); *In re Orthopedic Bone Screw*, 1995 WL 428683, at *6 (joinder based on claimants having "the same or similar device of a defendant manufacturer implanted in or about their spine" is improper); *see also Purdue Pharma, L.P. v. Estate of Heffner*, 904 So. 2d 100, 103 (Miss. 2004) ("The mere taking of the *same* prescription drug does not supply plaintiffs with the *same* transaction or occurrence, or *same* series of transactions or occurrences, as required by [Mississippi] Rule 20.") (citing *Janssen Pharmaceutica, Inc. v. Armond*, 866 So. 2d 1092 (Miss. 2004) (en banc)).

Order No. 15), *available at* http://www.wawd.uscourts.gov/mdl. She subsequently denied Respondents' motion to remand, *see In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, No. MDL 1407 (W.D. Wash. May 5, 2004), *available at* http://www.wawd.uscourts.gov/mdl, and, pursuant to Case Management Order No. 15, each plaintiff was required to file individual complaints. As other courts have done in similar situations, Judge Rothstein has refused to allow the plaintiffs in this case to circumvent the removal statute.

By failing to recognize the doctrine of fraudulent misjoinder and reversing Judge Rothstein, the Ninth Circuit decision not only works an injustice in this case; it also encourages pharmaceutical mass tort plaintiffs to misjoin parties in what the *Tapscott* court called "wholly distinct" cases, 77 F.3d at 1360, expecting that district courts in the Ninth Circuit, including MDL courts, will now be required to remand their cases to state court.

In addition to encouraging "joinder gamesmanship," the Ninth Circuit decision, if followed in other Circuits, will greatly undercut the benefits of multidistrict consolidation. The MDL process, which has become so critical in recent years to handling the problem of mass torts, relies upon the proper administration of the removal process because § 1407 transfers are authorized only from federal court. *See* 28 U.S.C. § 1407(a). With district courts stripped of their ability to sever fraudulently misjoined parties and exercise federal diversity jurisdiction over the remaining cases, § 1407's effectiveness will be significantly hampered.

C. The recent enactment by Congress of the Class Action Fairness Act ("CAFA") of 2005, Pub. L. No. 109-2, 119 Stat. 4 (2005) (codified in scattered sections of 28 U.S.C.), further illustrates the importance of the fraudulent misjoinder doctrine. Designed both to stem the "parade of abuses" committed by plaintiffs' lawyers

and keep interstate class actions out of state court, S. Rep. No. 109-114, at 6 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 3, 7, the Act dramatically expands federal jurisdiction over interstate class actions by relaxing the complete diversity requirement for such actions, *see* 28 U.S.C. § 1332(d), and strengthening the related removal provisions, *see id.* § 1453.[6]

CAFA evidences a strong public policy in favor of resolving complex mass-party litigation in federal court. *E.g., Evans v. Walter Indus., Inc.*, 449 F.3d 1159, 1164 (11th Cir. 2006) ("The language and structure of CAFA itself indicate[] that Congress contemplated broad federal court jurisdiction . . . ."); S. Rep. No. 109-14, at 4, *as reprinted in* 2005 U.S.C.C.A.N. at 6 ("key reason" for problems with class action system "is that most class actions are currently adjudicated in state courts"). The enactment of CAFA reflects the extent to which plaintiffs' counsel have been successful -- primarily through forum shopping and fraudulent joinder -- in keeping interstate class actions out of federal court. *See* S. Rep. No. 109-14, at 10, *as reprinted in* 2005 U.S.C.C.CA.N. at 11 ("In interstate class actions, plaintiffs' counsel frequently and purposely evade federal jurisdiction by adding named plaintiffs or defendants simply based on their state of citizenship in order to defeat complete diversity."); *id.* at 14-15, *as reprinted in* 2005 U.S.C.C.A.N. at 14 (noting that many class actions are brought in "improbable jurisdictions" and finding that one reason for the

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[6] CAFA also applies to "mass actions," defined in the statute (with certain exceptions) as "any civil action . . . in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact." 28 U.S.C. § 1332(d)(11)(B)(i); *see also id.* § 1332(d)(11)(A) ("[A] mass action shall be deemed to be a class action removable under paragraphs (2) through (10) if it otherwise meets the provisions of those paragraphs.").

"dramatic explosion of class actions in state courts is that some state court judges are less careful than their federal court counterparts about applying the procedural requirements that govern class actions").

The fraudulent misjoinder doctrine serves goals similar to CAFA's: combating the gamesmanship of plaintiffs' lawyers and allowing complex multi-plaintiff, multi-defendant litigation to proceed in federal court. In fact, CAFA applies to certain non-class action suits -- so-called "mass actions." *See supra* note 6. However, because a "mass action" is defined in the statute as involving 100 or more plaintiffs, *see id.*, counsel can easily avoid the Act's reach by doing what Respondents in this case have done: fraudulently join fewer than 99 additional plaintiffs. *See* Hines & Gensler, *supra*, at 809 ("In order to escape [CAFA's] liberalized jurisdiction and removal provisions, one suspects that plaintiffs will file ever more joined-but-not-mass actions. And having taken that step to avoid class action and mass action removal under CAFA, it seems likely that many such plaintiffs will also join spoiler parties to defeat ordinary diversity removal."); *see also* Carol Rice Andrews, *The Personal Jurisdiction Problem Overlooked in the National Debate About "Class Action Fairness,"* 58 SMU L. Rev. 1313, 1384 (2005) ("CAFA motivates counsel to otherwise avoid federal subject-matter jurisdiction by joining a large number of multi-state plaintiffs under traditional party joinder rather than the class action device . . . .").

Of course, joining together 100 or more plaintiffs does not *guarantee* treatment under CAFA. But it would be incongruous if removal of a mass pharmaceutical personal injury action could be defeated by the same species of forum manipulation that animated the adoption of CAFA, simply because it involved fewer than 100 plaintiffs. Consequently, a strong fraudulent misjoinder doctrine is an essential complement to CAFA in carrying out Congress's stated goal of preventing procedural

chicanery depriving defendants of their proper removal rights.

II. Cases Involving Fraudulent Misjoinder Rarely Reach the United States Courts of Appeals and Correction of the Doctrine Therefore Depends Upon This Court

The Ninth Circuit decision in this case is likely to have a disproportionate impact because, as detailed below, cases involving fraudulent misjoinder very infrequently reach the federal appeals courts. Because guidance from the Courts of Appeals on the issue of fraudulent joinder is so scarce and it may well be years before the issue is properly presented again, this Court should take this opportunity to provide much-needed clarity on the vitality and applicability of the fraudulent misjoinder doctrine. *See* Percy, *supra*, at 575 (calling appellate review of fraudulent misjoinder doctrine "imperative").

Federal appellate review of cases involving fraudulent misjoinder is extremely rare for two reasons. First, a district court's decision to remand a case to state court is generally not appealable. 28 U.S.C. § 1447(d) ("An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise . . . ."). As a result, federal appellate courts typically cannot correct lower court decisions that either fail to recognize the doctrine of fraudulent misjoinder or that, while recognizing it, apply it improperly.[7]

Second, a district court's refusal to remand a case to state court is not a final appealable order under 28

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[7] Review of remand orders remains possible in civil rights cases, 28 U.S.C. §§ 1443, 1447(d), and in cases remanded for reasons other than lack of subject matter jurisdiction, *San Francisco v. PG & E Corp.*, 433 F.3d 1115, 1121 (9th Cir. 2006).

U.S.C. § 1291. *E.g., Neal v. Brown*, 980 F.2d 747, 748 (D.C. Cir. 1992) ("The decision to deny the remand clearly does not end the litigation, but merely determines that it will proceed in federal court. In holding that a denial of a motion to remand is not appealable under § 1291, we are in accord with every other federal court of appeals that has addressed this issue."). For this reason, even though review of an order denying remand can still occur, *see Tapscott*, 77 F.3d at 1356 & n.4 (exercising interlocutory jurisdiction under 28 U.S.C. § 1292(b)), it is exceptional.

The Ninth Circuit decision in this case has turned upside-down the critically important doctrine of fraudulent misjoinder. Because the possibility of correction in the federal appeals courts is severely limited, it is an appropriate exercise of this Court's limited certiorari jurisdiction to grant review in this case.

CONCLUSION

For the foregoing reasons, amicus respectfully asks this Court to grant a writ of certiorari to resolve the important question presented herein.

Respectfully submitted,

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